Democracy and the Constitution

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DEMOCRACY AND THE CONSTITUTION
Essays by Walter Berns

Democracy and the Constitution

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Introduction

One of the distinctive things about America is that its Founders were political theorists as well as practitioners. Consider, as the most telling example, the Declaration of Independence. It was drafted by Thomas Jefferson, John Adams, and Benjamin Franklin, men who had distinguished political careers, but who also wrote books and scientific papers and founded universities (Jefferson the University of Virginia and Franklin the Philadelphia Academy, which became the University of Pennsylvania). Franklin was also one of the founders of our first so-called learned society (the American Philosophical Society), and Jefferson served as one of its first presidents. As for James Madison, Alexander Hamilton, and John Jay, they combined under the pseudonym of Publius to write *The Federalist* (or *Federalist Papers*), which has been described in our own time as "the most important work in political science that has ever been written, or is likely ever to be written, in the United States."[1]

Not only were they all political theorists, but they were completely confident of the theory they espoused. "We hold these truths to be self-evident," they declared in 1776, that all men are equally endowed with certain unalienable rights, and that government is instituted "to secure these rights." They believed it important that students, specifically university students, receive instruction in these matters. Accordingly, when designing the curriculum for his University of Virginia, Jefferson proposed that students be thoroughly schooled in "the general principles of liberty and the rights of man, in nature and in society." To this end, he recommended, among the books to be read, John Locke's treatises of government, and, of course, the Declaration of Independence, *The Federalist*, and the Constitution. Who better to assign this reading than professors of political science? At any rate, I thought it appropriate to devote a good portion of my time in the

classroom to expounding and defending the principles of liberal democracy and the institutions embodying it here in the United States.

First among these institutions is the Constitution, which, alas, is not always taken seriously by judges, even Supreme Court justices. They tend to treat their judicial commissions as letters of marque authorizing them to keep the Constitution in tune with the times, as the saying goes, which in practice means *their* view of the times and what *they* think the times require. For example, in the University of Michigan Law School case of 2003,[2] the Court held—presumably because the "times" required them to hold—that a race-conscious admissions policy was not unconstitutional at the time, but would become so in twenty-five years' time; which is to say, the policy was obviously unconstitutional, but we are not yet prepared to say so.[3]

What is true of the Constitution is also true of the Declaration of Independence. We have it on the authority of James Madison (see *Federalist* 39) that the Constitution is "reconcilable with the fundamental principles of the Revolution," but courses on those principles are hard to find in our universities. For example, the history department at Harvard, our oldest and most distinguished university, apparently does not have a course on the American Revolution or on the Founding of the United States. Yet, the subject would seem to be of considerable importance. Did God have something to do with the Founding? Can we do without him now? Was the Revolution really a revolution? On the same subject, what is the provenance of our unalienable rights, and which of them, if any, do we retain after government is instituted?

These are enduring questions, and their importance justifies the publication, in most cases the republication, of these essays, beginning with those on constitutionalism. What is more, the United States happens now to be engaged in the effort to export democracy—meaning, I trust, constitutional democracy—to countries that have never known it, an effort in which I have personally been involved. As I wrote in the preface of my book, *Making Patriots*:

> In 1987, the bicentenary of our Constitution, I was in Brazil, where the people had recently overthrown a military dictatorship and had begun the process of writing a democratic constitution. I had been invited to lecture on constitutionalism. At one place, a university in Recife, after I had finished my prepared remarks, someone got up and denounced, not me, but the local

> official who had sponsored my appearance. "Why," he shouted, "did you invite an American? What can they tell us about constitutions? They've had only one. Why didn't you invite a Bolivian? They've had a hundred."[4]

There was, of course, good reason to invite an American to address this subject. Who else? Who is better suited to do it? What other country can match our experience of constitutional government? Besides, there is nothing peculiarly American about our principles. On the contrary, they are abstract and universal principles of political right, a product of political philosophy; any people might subscribe to them, and Jefferson expected that, in the course of time—and with a little help?—every other people would do so. Speaking of the Declaration of Independence on the eve of its fiftieth anniversary, he said,

> May it be to the world, what I hope it will be, (to some parts sooner, to others later, but finally to all,) the signal of arousing men to burst the chains [that bind them], and to assume the blessings and security of self-government. . . . All eyes are opened, or opening, to the rights of man.[5]

As always, I am grateful for the support given me over the years by the American Enterprise Institute and especially its president, Christopher DeMuth, who encouraged me to publish this volume of essays, and by Morgan Goatley, who, quite literally, put them all together. My greatest debt is to my daughter, Elizabeth Fradkin, who, at a time when I was incapacitated, stepped in, read and corrected the proofs. For this, and for her devotion generally, I am very grateful.

With the exception of "Under God" and "Remembering Herbert Storing," all of these essays were published earlier, the earliest in 1987. I have made modest revisions to some of them for this publication, but others I have been content to leave as they were. In one way or another, they all address the subject of constitutional democracy, which, as we know from experience, is never out of date.

Washington, D.C.
May 2006

Part I

Constitutionalism

Preface

Tocqueville does not use the word, but he was speaking of constitutionalism when he said that men living in democratic centuries "do not readily comprehend the utility of forms." Indeed, he contends that they "scorn" them, even "hate" them, because they get in their way. By "forms" he means the ways, especially the proper ways, of doing things; in our case, they prescribe the powers of government (legislative, executive, judicial), by whom the powers are to be exercised, and, of greatest importance, *how* they are to be exercised.

Forms are not designed to be efficient, and they can be cumbersome or, as Tocqueville puts it, inconvenient. But, he says, this "inconvenience" is precisely what renders them so useful to freedom, their principal merit being to serve as a barrier between the strong and the weak, he who governs and he who is governed, to slow down the one and to give the other the time to recollect himself. He concludes by saying that "democratic peoples naturally have more need of forms than other peoples, and they naturally respect them less."[1]

If so, this makes the American achievement all the more remarkable, and the judgment of its people commendable. In 1787, their appointed leaders devised a very formal Constitution, one that imposed a variety of limits on popular rule, and, in 1789, by ratifying it, they themselves agreed to live under and within it. And so they have now for more than two hundred years.

1

Ancients and Moderns: The Emergence of Modern Constitutionalism

The idea of constitutionalism, or limited government, is as old as political science, but there were constitutions before there was constitutionalism or political science. The ancient Greek cities had constitutions; fragments of more than a hundred of them have been preserved in the works of ancient grammarians and lexicographers. But Aristotle's *Constitution of Athens* is the only one to have survived more or less intact and recognizable for what it is, and what it is not.

The *Constitution of Athens* is not a document (or part of a document) in any way similar to the Constitution of the United States; which is to say, it is not a written constitution. It is, instead, a history of a constitution, but unlike the British it does not begin with, or take its bearings from, anything similar to Magna Carta. It is a history of changing constitutions (or "constitutional orders")—monarchy, oligarchy, democracy, anarchy, tyranny—but not a history of constitutional change. Ruler followed ruler, time and again and for years on end, but none could claim a legal or constitutional right to rule, not even the legendary Solon, to say nothing of his successors.

Solon (Plutarch devotes a chapter to him in his *Lives*) first came to public notice by pretending to be mad, and, even so, with the city at war with itself—the people at war with the wealthy—he was chosen to be archon and lawgiver, "the rich consenting because he was wealthy, the poor because he was honest."[1] A famous lawgiver, he said he wrote laws "for a hundred years," but the people "began to quarrel" during his absence in Egypt and Cyprus, and after his return Pisistratus seized power. Then, having established a tyranny, Pisistratus was driven into exile by the parties of Megacles and Lycurgus.[2] So goes this history, and it is clearly not a history of constitutional government or constitutionalism.

According to its editors and translators, the *Constitution of Athens* "cannot have been intended for publication," and they go on to suggest that Aristotle (and his students) must have written it before he wrote the *Politics*.[3] This is almost surely the case. The former is an account of what is, the latter an attempt to provide knowledge of what might be; and this, according to Aristotle's own principles, cannot be done without knowing what is. Which is to say, theory depends (in part) on practice. Moreover, in the beginning—and Aristotle was at the beginning—political philosophy was the study of politics unmediated by, or without reference to, any previous philosophic study of politics.

So it was that—unlike Machiavelli, who had to contend with Plato and Aristotle (and silently with the Bible), or Locke with Filmer, Rousseau with Hobbes and Locke, Marx with Hegel, Nietzsche with Socrates, and Heidegger with everybody—Aristotle could proceed directly to the study of the fundamental political questions: What is the *polis* (city) and the citizen, and what is the best form of government, or constitution? The whole of book 4 of the *Politics* is devoted to answering (or, at least, discussing) the latter question; but since the best constitution is ideal (and therefore unattainable), the question becomes, which is the best practicable constitution?

Many factors enter into the decision, such as a city's size, location, wealth, and whether its people are capable of living and willing to live under the rule of law. After weighing the many factors, Aristotle decides in favor of what has come to be called a "mixed regime," which he describes in one place as a "mixture of oligarchy and democracy." From this mixture comes a middle class, and it is clear, he says, that the "political community administered by the middle class is the best."[4] It alone "is free from factions," and for that reason is likely to be stable and its rule moderate. He gives it the name "polity"; it is his version of constitutional government.

The modern case for constitutional government was best stated by the reputed Father of the American Constitution, James Madison. "In framing a government which is to be administered by men over men," he said in *Federalist* 51,

> the greatest difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the

> primary control on government; but experience has taught mankind the necessity of auxiliary precautions.

What he proposed as a precaution, and what the Americans adopted, was a separation of powers, a system different (but not altogether different) from the first mixed constitution to be adopted, that of republican Rome.

Designed so as to avoid the defects inherent in each of the simple forms of government—monarchy, aristocracy, and democracy—Rome's mixed constitution did not separate powers, but it guarded against an undue concentration of power by a system of checks and balances. Rome's political philosopher (Cicero) favored it because it provided all that could be hoped for from a constitution: "an even balance of rights, duties, and functions, so that the magistrates have enough power, the counsels of the eminent citizens enough influence, and the people enough liberty."[5]

The Greek historian Polybius (205–123 BC) said that this mixture was so successful "that it was impossible even for a native to pronounce with certainty whether the whole system was aristocratic, democratic, or monarchical."[6] In fact, however, any native with his wits about him could have seen that the aristocracy played the decisive role in this government. Cicero was candid about this. He said that the success of this system depended on the aristocracy, which must be "free from dishonor [and] a model for the rest of the citizens."[7] The English constitutionalists, Bolingbroke, Burke, Bagehot, and even John Stuart Mill, could appreciate this. In fact, could it not be said that England's success depended on the aristocratic element in its own constitution?

But what is meant by success? Montesquieu, writing in the mid-eighteenth century, denied that the Roman constitution was a success. Polybius—Montesquieu referred to him as the "judicious Polybius"—declared it one, but his account was theoretical and idealized, unsupported by evidence. Montesquieu looked at its history, and found, instead of a stable, institutionalized balance of factions, a slow but steady evolution toward mob rule. He wondered whether there might not be a way of improving on the Roman system, and, with this in mind, he examined the English constitution.

He did this in a chapter entitled, "Of the Constitution of England," but his account of the English constitution was as much idealized as

Polybius's account of the Roman.[8] And deliberately so. The English figures in his account only because it bore some resemblance to the form of government under which political liberty was best secured. This proved to be one in which the three powers of government—the executive, legislative, and judicial—were divided, and in which the legislative was also divided, one house representing the body of the people, the other representing the nobles, those distinguished by birth, wealth, or honors. The executive, in turn, should be a monarch, and possess the veto power, and the judiciary was to be independent of the other branches because its task—like that of the judiciary under the American Constitution—was to protect civil liberties, property rights, and the rule of law.

But the English differed from Montesquieu's model constitution in important respects. The House of Commons could not, at that time, be said to represent the body of the English people. Its franchise was limited to a few propertied men, and its leading figures—Walpole, Stanhope, Pitt—were anything but common. Nor could a judge refuse to enforce, or overturn, an Act of Parliament. Sir Edward Coke claimed this power in Dr. Bonham's case, saying that "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void."[9] The king responded by dismissing him from office.

It was not until the Act of Settlement of 1701 that the tenure of judges was made independent of the king, but by that time the constitutional issue had been resolved against the Crown—in fact, if not in theory—and in favor of Parliament. So it was that the last monarch to veto an Act of Parliament was Queen Anne in 1708. Singular at the time, it would not be repeated by her successors, especially the first of them, George I. Not only was he a German, and spoke only German, but he came to the throne not by divine right or rule of descent, but by Act of Parliament. Champions of Parliament, the Whig party would have imposed this requirement on all future claimants for the throne, whereas the Tory party believed fervently in the divine right of kings.

Implicit in this disagreement was the larger and constitutional question of who was to rule, Parliament or king; the Whigs favored the one, the Tories the other. Interestingly enough, Montesquieu made no mention of the Whigs and Tories. Such parties (Tocqueville was later to call them

"great" parties) were not supposed to exist in his system. By his time, however, and thanks largely to the Whigs, the principle of parliamentary supremacy was firmly established in the English constitution.[10]

This constitution was obviously not based on the new idea of separated powers. Nor did it conform to Thomas Paine's still newer idea of a constitution as an act of the people antecedent to government and defining the authority committed to government.[11] It was, even then, an old constitution. Bolingbroke said as much in his *Dissertation upon Parties* in 1733:

> By constitution we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions, and customs, derived from certain fixed principles of reason, directed to certain fixed objects of the public good, that compose the general system, according to which the community hath agreed to be governed.[12]

By laws, Bolingbroke probably had in mind, first of all, Magna Carta. Originally merely an agreement between King John and the barons of the realm, it was made a statute in 1297. He also would have been thinking of the Toleration Act of 1689, guaranteeing religious liberty (except for Roman Catholics); the Bill of Rights of 1689, guaranteeing, among other things, free parliamentary elections and the right to petition for redress of grievances, and forbidding cruel and unusual punishments; the Act of Settlement of 1701, which defined the conditions upon which the Crown should be held and provided that the judges would serve during good behavior (*Quam diu se bene Gesserint*); and the Triennial Act of 1694, which limited the life of a parliament to three years. Bolingbroke was thinking of the Triennial Act when he said the Septennial Act of 1716 was a "monstrous" violation of the principles of the Revolution of 1688. Paine looked at the Septennial Act and drew the conclusion that England had no constitution.

He would have been closer to the truth if he had said that England had no constitution in his sense, meaning a constitution whose provisions could be enforced. In this case, the Septennial Act would be declared unconstitutional or *ultra vires*, thus unenforceable. Under the English constitution, however, Bolingbroke could say only that the government enacting it was not a good government, with the hope that it might be replaced at the next

election. As Lord John Russell was to say some years later, "the only appeal is to the people at large."[13] Paine would have thought this fruitless. But this, surely, was a mistake; over the years, the English proved to be a good constitution—indeed, "the envy of less happier lands"[14] and its governments better than most.

The English constitution was to find its greatest champion fifty or sixty years after Bolingbroke in the person of Edmund Burke, a member of the House of Commons for almost thirty years and a staunch defender, as well as a reformer, of the British Empire. The French Revolution was to turn him into a political theorist of sorts, an antitheory theorist, a constitutional theorist, in order to protect England from the theory responsible for the "extraordinary convulsion" in France. The French Revolution, a "revolution in sentiments, manners and moral opinions," was something new, and something alarming, especially because its principles appeared to be readily exportable. Its declaration of the rights of man would appeal to men everywhere—Rousseau (after Hobbes and Locke) was not writing only for the French—and it threatened to reduce not only the French but the peoples of all Europe to "one homogeneous mass." Burke called it a "barbarous philosophy," giving rise to a selfish politics of self-interest. Burke spared no words in denouncing it.[15]

The new French constitution was, he said, "the very reverse of [the British] in its principle." Self-interest was no part of the latter; British society rested on a contract, but not a contract that could be dissolved and renewed at the pleasure of any generation. It was, instead, a contract—Burke referred to it as a partnership—"between those who are living, those who are dead, and those who are to be born."[16] Unlike the French, who had "made a philosophy and religion of their hostility to such institutions," the British were "resolved to keep an established church, an established monarchy, an established aristocracy, and an established democracy, each in the degree it exists, and in no greater."[17] Landed property was also established, because with it came the rule of gentlemen.

These institutions are "established," not recently made or designed; as Burke puts it, king, lords, juries, "grand and little"—all are prescriptive. Prescription, in Roman law, gave title to landed property by possession or long-continued use and without a deed; Burke transforms this rule of private law into a rule of public law. "Prescription is the most solid of all

titles," he says, "not only to property, but, which is to secure that property, to government."[18] The British constitution rests on these prescriptive establishments; indeed, Burke calls it a "prescriptive constitution . . . whose sole authority is, that it has existed time out of mind."[19] Prescription, he says, is the "great fundamental part of natural law."[20]

But what *is* the natural law, of which prescription is the fundamental part? Except in name, it differs widely from that of Hobbes or Aquinas. For Hobbes, the fundamental law of nature, which derives from the right of nature, is "*to seek peace, and follow it*"; for Aquinas, the natural law, grounded on the eternal law (God himself), prescribes the ends, and the order of ends, to which man is by nature inclined. But Burke says nothing about the substance of his natural law; nor, unlike Aquinas, does he say that a human law that disagrees with natural law does not have the force of law.

But if prescription is the fundamental part of that law, it prescribes the means rather than the ends to be pursued by government, or better, it describes the manner in which the constitution has grown over time. From Magna Carta to the Declaration of Rights, Burke says, "It has been the uniform policy of our constitution to claim and assert our liberties, as an *entailed inheritance* derived to us from our forefathers, and to be transmitted to our posterity [as] an estate specially belonging to the people of this kingdom." This policy, he adds, "appears to me to be the result of profound reflection; or rather the happy effect of following nature, which is wisdom without reflection, and above it."[21]

But, even in this sense, the natural law is a law beyond and above human legislation. The importance of this should not be minimized. Burke did for the British constitution what Bolingbroke and others never attempted to do; they spoke of the laws making up the constitution, but Burke provided it with a law of laws, or, as he puts it, a "superior law."[22] By giving the constitution a natural-law foundation, he enhanced its status in France and, of greater importance, its authority in England, especially among those charged with governing there.

But who are they? Not the people. It is the role of government to provide for human *wants*, by which Burke means not food and lodging but a "sufficient restraint upon their passions." This is missing "out of civil society"—or as Hobbes and Locke put it, in the state of nature—and is a requirement in, indeed, a condition of, civil society. Thus, it is required of

government that the "inclinations of men be thwarted, their will [be] controlled, and their passions brought into subjection." Burke goes so far as to say that "the restraints on men, as well as their liberties, are to be reckoned among their rights."[23] To secure this right, the majority of men must be guided by the few who are superior in virtue and honors ("*virtute et honore majoroes*"), or a "true natural aristocracy."[24]

Thus, what Aristotle, Polybius, and Montesquieu proposed to do with their various versions of a mixed constitution and James Madison with his "auxiliary precautions," Burke proposed to do with his natural aristocracy: to impose a check on the popular will.

But, beginning in 1832, and continuing in 1867 and 1884, the British voting franchise was expanded to include, first, the middle class and manufacturers, then the workingmen in towns and cities, and, finally, the householders and lodgers in all counties and boroughs throughout the United Kingdom. In effect, England became a democracy of householders, and still later, especially after the House of Lords lost its place as an equal second chamber, a democracy simply. Yet, socially speaking, many of the political leaders chosen under a democratic franchise in the early years of the twentieth century—Balfour, Baldwin, Asquith, Austen, and Neville Chamberlain, to say nothing of Churchill—did not much differ from the Victorians Palmerston, Gladstone, Disraeli, Joseph Chamberlain, and Randolph Churchill or, for that matter, the "natural aristocrats" of Burke's time, Pitt, Fox, Grenville, and Townshend. Democracy came into its own with the election of the first Labour government in 1945, but I doubt that even Burke would say that this marked the end, or the beginning of the end, of constitutional government in Britain.

Now, fifty-plus years later, Ralf Dahrendorf (the one-time head of the London School of Economics and now a member of the House of Lords) wonders whether European democracy can survive globalization.[25] For the same reasons, I wonder whether British constitutionalism can survive membership in the European Union.

Britain has yet to agree to the common currency, but, except for that, the European die is cast. The Queen's subjects are now citizens of the Union, with its parliament in Strasbourg and its vast and ever vaster bureaucracy in Brussels. Under the treaties, dutifully signed by the British (Douglas Hurd and Francis Maude at Maastricht, Robin Cook at Nice), the Union promises to

"strengthen the protection of the rights and interests of the nationals of its Member States," as well as their "fundamental rights, as guaranteed by the European Convention on Human Rights signed in Rome 4 November 1950,"[26] and, finally, to protect their fundamental rights from being violated by their own governments. This is to be done by the European Council, which "can declare the existence of a serious and persistent breach of fundamental rights [and to enforce this provision] it may suspend certain rights of the country concerned."[27] (To protect what remains of her sovereignty, Britain would have 78 of 732 seats in the European Parliament, 29 of 345 votes in the council, and one member each in the Court of First Instance and in the Court of Justice.) Whether its structure is such as to guarantee a government of limited powers remains to be seen.

I don't know if the British are serious about this, but the Germans surely are. As they see it, the Europe of nation states was a Europe of wars, and they intend to do away with wars by doing away with nation states. Do the British understand this? The new Europe under the now-rejected constitution would have a common foreign policy. All well and good, perhaps, except that constitutional government, to the extent that it has existed anywhere, has existed only in a nation state, and then, as the Framers of the American Constitution knew very well, only under certain conditions.[28] For this reason, they would have thought it preposterous to yield any part of their sovereignty to a super or supranational body. I think Burke would have agreed.

Burke is famous among Americans for his support of their revolution. He pointed out, correctly, that "the people of the colonies [were] descendants of Englishmen"; and that England was a nation that respected her freedom; and that the colonists emigrated from England "when this part of [English] character was most predominant; and [that] they took this bias and direction the moment they parted from [English] hands."[29] And he was mostly correct when he said the colonists were devoted to liberty according to English ideas and on English principles. Indeed, it was the practice of the aggrieved colonists to speak of their rights as Englishmen. Yet, like the French, they made a revolution by invoking the rights of man, not their rights as Englishmen, and, more precisely, their natural rights to life, liberty, and the pursuit of happiness.

The fact is, the American Revolution was closer to the French than Burke was willing to recognize. Admittedly, it was not a revolution in

"sentiments, manners, and moral opinions"; nor did the Americans abolish a church, seize its property, and kill its priests and prelates; nor, by way of demonstrating a determination to rid themselves of every vestige of their Christian (indeed, their religious) inheritance, did they replace the Gregorian calendar with one devoid of any ecclesiastical connections. Nevertheless, they did claim that America was a new order of the ages (a *novus ordo seclorum*), and they meant this claim to be taken seriously.

Certainly, theirs was a new kind of constitution. It was based on a new principle, derived from the new idea of democracy which, in turn, was the product of the new political philosophy of Thomas Hobbes and, especially, John Locke ("America's philosopher," as he came to be called). It was Locke who (greatly to simplify) demonstrated that all men are created equal insofar as they are equally endowed with certain unalienable rights. Following him, Americans said government is instituted "to secure these rights," and when any form of government fails to do this, "it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." This means that the people are the source of legitimate government. The name for this is popular sovereignty, and popular sovereignty is the salient feature of modern constitutionalism.[30]

It is not, however, the only feature. Since all men are created free and equal, it follows that no man may govern another without his consent. This consent is originally given in a constitution, and, since the constitution states the terms under which men agree to be governed, the constitution has to be written. Men insist on this, and not only Americans. Thus, every country in the world—except Britain, New Zealand, Israel, Saudi Arabia, Oman, and Libya—now has a written constitution. Now, the modern world is, as Alexis de Tocqueville was the first to point out, irreversibly democratic; this, he said, is a "providential fact."[31] What this means is that limited or constitutional government can no longer (if it ever could) be achieved by mixing democracy with oligarchy or aristocracy, and it goes without saying that the day is long past when someone can claim to rule by the grace of God. Limited or constitutional government is possible in this democratic world only if the people are willing to impose limits on themselves. The American people did just this in 1788 when they ratified the Constitution.

Its Framers made no effort to conceal the fact that they intended to put limits on democratic majorities; they said as much. The Constitution, they said, would exclude the people "*in their collective capacity*" [italics in original] from any share in the government.[32] They took pride in the fact that their government was not a democracy, but a republic that put some distance between the people and the levers of power. The Constitution did this by providing

- a president chosen not by the people but by electors who, having made their choice, would immediately disband;
- a Senate chosen not by the people but by the various state legislatures, each state, regardless of the size of its population, being entitled to choose two;
- a House of Representatives chosen not by a majority of the whole people ("*the people in their collective capacity*") but by majorities within each of the districts into which each state would be divided;
- and, finally, a Supreme Court, with the power to veto popular legislation and whose members would, in effect, serve for life.

Generally, the Constitution provides a system of majority government, but the governing majority is assembled not from among the people directly but from among the representatives of the people. Because they represent different interests, and because the legislative branch is separated from the executive, and because the legislative is itself divided into House and Senate, assembling this majority is no simple matter. It was not supposed to be. Even so, as I said, this majority is subject to a Supreme Court veto.

The people were left in no doubt about the essential features of this Constitution. Every aspect of it was subjected to intense scrutiny during the ratification debates, which were carried on in town meetings, state conventions, and the popular press. Among the opponents were famous men, leading figures in the Revolution—Patrick Henry, for example. He led the opposition in Virginia, saying the Constitution had "an awful squinting; it

squints toward monarchy."[33] Yet Virginia (albeit by a narrow margin) voted in favor of ratification, as did every other state. Under the circumstances, this was truly remarkable.

Equally remarkable is the fact that the Constitution has endured for more than two hundred years. Of course, it has been amended, and, aside from the original ten comprising the Bill of Rights, almost every one of the amendments has been democratic in character—putting an end to slavery, for example, expanding the voting franchise, providing for the popular election of senators, and permitting the Congress to levy a progressive tax on incomes. But this does not, I think, fully explain the abiding popularity of the Constitution.

Thomas Jefferson was of the opinion that a constitution could endure only if it were frequently submitted to the people for amendments, but Madison objected. He objected because

> every appeal to the people would carry an implication of some defect in the government, and frequent appeals would, in great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability. [34]

Rather than submit constitutional questions to the people, Madison preferred that they be submitted to the courts, ultimately the Supreme Court; and the manner in which the courts consider and dispose of them has much to do with the continued popularity of the Constitution. One jurist saw this even though he refused to acknowledge what it was that he saw. The Supreme Court, he said, is preoccupied "with the constitutionality of legislation," and this, in turn, causes the people to be preoccupied "with a false value." The tendency of focusing attention on the constitutionality of legislation, he said, "is to make constitutionality synonymous with wisdom."[35] Exactly, and this goes far to explaining the continuing popularity of the Constitution.

It has survived so long not because it is written in stone (so to speak) but because the people have become accustomed to it. More than that, they have come to esteem it and the men who framed it. Madison hoped it would somehow acquire "that veneration which time bestows on

everything"; and so it has. Burke would appreciate this. He spoke of the British constitution as a "prescriptive constitution . . . whose sole authority is, that it has existed time out of mind." Something like this might also be said of the American.

2

The Illegitimacy of Appeals to Natural Law in Constitutional Interpretation

I

I begin by stating the obvious: Federal judges are not in the habit of invoking natural law to support their constitutional decisions. Rather, they invoke one or another—and sometimes a handful—of specific constitutional provisions. This is not an accident. Their authority is limited to deciding cases and controversies—for my purposes here, cases arising "under the Constitution" or "the laws of the United States"—which they weigh in the balance with the relevant constitutional provision. And most of these provisions—or, at least, those most frequently cited—have to do with rights, which, again, is not by accident since, as we are taught by the Declaration of Independence, the purpose of government is the securing of rights.

True, there once were occasions when Supreme Court justices appealed to something at least formally akin to natural law. For example, in the very early *Calder v. Bull*, Justice Samuel Chase grounded his decision on "the first principles of the social compact" (which led the dissenting James Iredell to protest that a court was not entitled to hold a legislative act void on the ground that it was contrary to "natural justice"),[1] and a few years later, Justice William Johnson, in a concurring opinion, joined in the invalidation of a state law by invoking "the reason and nature of things: a principle which will impose laws even on the Deity."[2]

But these extraconstitutional excursions have long since fallen into disrepute, at least nominally. The modern Chase or Johnson eschews reliance on "natural justice" or the "reason and nature of things" in favor of some constitutional text that, as he reads it, makes such excursions unnecessary.

As sometimes read, these texts prove to be more capacious or commodious than earlier justices could have imagined. Thus, in the Connecticut birth control case, Justice William O. Douglas referred to various guarantees in the Bill of Rights and found in them "penumbras, formed by emanations," which, in turn, contained "a right of marital privacy." Three of his concurring colleagues found that right in the Ninth Amendment.[3]

This sort of jurisprudence found no favor with Justice Hugo L. Black. He denounced it as the "natural law due process [or 'whatever'] philosophy," and, in case after case, denied that the Court had any such jurisdiction. "If these formulas based on 'natural justice,' or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary."[4] Although Black may have been right about the purpose for which they are employed, these "formulas"—natural law or justice and reserved rights—do not in fact mean the same thing. In fact, they mean different things.

But Black was not alone in failing to distinguish them; so, too, did the venerable Roscoe Pound. Hoping to breathe some life into the "forgotten" Ninth Amendment, Pound seized upon the possibility that, with their reference to the "[rights] retained by the people," the Framers of the Constitution had in mind natural rights or—like Black, he tended to confuse them—natural law. But he was not willing to accept the understanding of these rights, or this law, current at the time of the Founding. In the fashion of those jurists and scholars who promote the cause of a "living constitution," he came up instead with the idea of mutable law and rights—mutable but, *mirabile dictu*, still natural. "Unlike the law of nature of the eighteenth century," he said, "the revived natural law is not a fixed system of precisely formulated rules to stand fast forever." The same is true of natural rights: "From this standpoint," he said, "the Ninth Amendment is a solemn declaration that natural rights are not a fixed category of reasonable human expectations in civilized society laid down once for all in the several sections of the Constitution."[5]

Except as a term used to lend dignity or authority to a judge's idiosyncratic policy preferences, the idea of nature simply disappears from Pound's jurisprudential musings. What is *natural* about a right or a law that has no fixed definition? How can *nature* provide the standard by which we

measure our laws and policies if, like them, the idea of nature changes with the times? Yet clearly, although they may have defined it differently, those who first employed the term "nature," whether in connection with law (Cicero and Thomas Aquinas) *or* rights (Thomas Hobbes and Thomas Jefferson), intended that it provide such a standard and understood its meaning as fixed.[6] It is, of course, the idea of a fixed meaning, not the idea or need of a standard, that is unacceptable to so many modern judges and constitutional lawyers. But, as I have argued in another place, you cannot have the one without the other.[7]

II

I have made the point that natural law and natural rights are not interchangeable terms. This is readily illustrated, if not demonstrated, in the work of the Court. Justice Black may denounce his colleagues for employing what he calls the "natural law due process [or 'whatever'] philosophy," or, as he put it in another case, the "natural-law-due-process formula,"[8] but the natural law, strictly speaking, played no role whatever in these cases, particularly in the most notorious among them, *Griswold v. Connecticut, Roe v. Wade*, and *Bowers v. Hardwick* (the 1986 case that upheld Georgia's anti-sodomy laws).[9] There the justices (in *Bowers*, the four of them in the minority) relied not on the natural law but on a right, specifically a right of privacy: for contraception, abortion, and sodomy, all practices specifically condemned by natural law as properly, or at least traditionally, understood.[10]

What, then, do we mean by moral philosophy and what is its role in constitutional interpretation? Here is John Quincy Adams writing in 1839 on the occasion of the Constitution's fiftieth anniversary:

> [The Constitution's] VIRTUES, its republican character, consisted in its conformity to the principles proclaimed in the Declaration of Independence, and its administration must necessarily be always pliable to the fluctuating varieties of public opinion; its stability and duration by a like overruling and irresistible necessity, was to depend on the stability and duration in the hearts and minds of the people of that *virtue*, or in other words,

> of those principles proclaimed in the Declaration of Independence and embodied in the Constitution of the United States of America.[11]

The Declaration begins by invoking both "the Laws of Nature and of Nature's God" and, in the following paragraph, the self-evident truth that government is instituted to secure the "unalienable rights" with which all men are equally endowed by their "Creator." It identifies the most important of those rights—to life, liberty, and the pursuit of happiness—but it says nothing further about those laws, nothing to aid us in identifying them or their relationship to the unalienable rights. Both the laws and the rights derive from, or are the gift of, the Creator, "Nature's God." But who is he?

According to John Courtney Murray, the well-known Catholic theologian, he is the God who revealed himself in the Bible. The Declaration of Independence, he writes, recognizes the sovereignty of this biblical God. The rights of which it speaks are the rights of Englishmen and the product of "Christian history," and these rights, even in the form they take in the Bill of Rights, are "tributary to the tradition of natural law, to the idea that man has certain original responsibilities precisely as man." That is to say, the rights of man are derived from his responsibilities (or duties). Responsibilities are primary, and rights secondary or derivative.[12] Here Murray might have quoted Matthew 22:37–40: "You shall love the Lord your God with all your heart, and with all your soul, and with all your mind. This is the great and first commandment. And the second is like unto it, you shall love your neighbor as yourself." Whatever rights we have are, presumably, dependent on our obedience to this law. John Locke, of course, had it otherwise. He said the state of nature has a law of nature to govern it, which law obliges everyone "as much as he can, to preserve the rest of mankind," but to do this only "when his own preservation comes not in competition."[13]

Now it is obvious that the Declaration does not speak of the rights of Englishmen; it speaks of "certain unalienable rights" which, on the face of it, would seem to suggest that rights are primary, as Locke said they were. One of these is the right to pursue happiness, presumably—although this will require argument—a happiness that each of us defines for himself. Was this a right enjoyed by Englishmen? The basis of it would seem to be freedom of conscience. Did English law, modeled, as Murray says, on the natural law,

recognize freedom of conscience? Freedom of conscience would find expression in a separation of church and state. Did England separate church and state? Be that as it may, does Roman Catholicism recognize freedom of conscience? Murray's answer to this is emphatic: Catholicism, he says, rejects "the absolute primacy of conscience," and his account of the provenance of the Bill of Rights requires him to conclude that freedom of conscience is not embodied in the First Amendment.[14] This amounts to saying that the principles of the First Amendment are not those of John Locke who, in his "Letter Concerning Toleration," said that "the care of . . . everyman's soul belongs unto himself, and is to be left unto himself," or of Thomas Jefferson, who said that "the operations of the mind [unlike] the acts of the body, are [not] subject to the coercion of the laws [and that] our rulers can have no authority over such natural rights, only as we have submitted to them [but the] rights of conscience we never submitted, we could not submit."[15]

Murray's question, and ours, comes to this: To understand the "Laws of Nature and of Nature's God" do we turn to Thomas Aquinas or John Locke?

Murray acknowledges the difference between Thomas's "natural law" (or, as he sometimes writes, "law of nature"), and Locke's law of nature; the last chapter of his book is devoted to explaining it. Locke's law of nature, he says, was the creature of the Enlightenment, and it was "as fragile, time-conditioned, and transitory a phenomenon as the Enlightenment itself."[16] So, too, with the "theory of natural rights," whose philosophical scaffolding he dismisses as "philosophical nonsense."[17] Locke's ideas of the law of nature, the rights of man, and the origins of society, he says, "are not derived from what is 'real,' from the concrete totality of man's nature as it really is."[18] Apparently, Locke did not see that, as a rational being, man can know the good toward which he is by nature inclined (which is the foundation or, better, the condition of the natural law as Thomas expounded it); indeed, although Murray does not point this out, Locke expressly denied that "the Law of Nature [is] inscribed in the minds of men" and that "the Law of Nature [can] be known from the natural inclination of mankind."[19]

According to Murray, quoting Thomas, men can know the natural law that forbids killing, or more precisely, murder. But according to Locke's law of nature, men may "destroy noxious things," which means, as Locke subsequently makes clear, the law of nature allows men to kill other human

beings. His position here is similar to that of Hobbes, who baldly states that a justly condemned murderer has a right to murder his jailers in order to save his own life.[20]

I could go on to make a list of the ways in which Locke's law of nature differs from the traditional natural law—contrasting their views on the basis of human sociality, on legitimate government, on the conscience, on happiness, on the care of children and on the honor due parents by children, and so on—but this work has already been done.[21] The question is, what does this have to do with America?

Murray's answer is nothing, or nothing much. Locke's ideas were picked up by "the French enthusiasts," he says, but not by the commonsensical British or, as he would have it, by the Americans. Whatever its vitality today, America was conceived in "the tradition of natural law," not, he argues, Locke's law of nature.[22]

But if Murray is mistaken about this, if we have a constitutional right to worship as we please or not to worship at all, and if this constitutional right derives from our natural right of conscience, or, in Jefferson's words, from our natural right to worship twenty gods or no god,[23] or from our unalienable right to define happiness as we see fit because, as Locke puts it, there can be no definitive understanding of happiness;[24] and if that natural right of conscience derives from the providential fact that the care of each man's soul belongs to himself alone, which means that, contrary to the Bible as read by Catholic, Protestant, and Jew alike, as well as to the Koran, God has not provided for the care of souls; if, in a word, the provenance of the Declaration of Independence and the Constitution is in the thought of John Locke, then what follows for John Courtney Murray and, to bring this home to us, the proponents of a natural law–based judicial review?

But the great body of evidence shows that Murray was wrong. It is undeniable that the Declaration adopts the language of Locke ("pursuit of happiness," "long train of abuses," mankind "are more disposed to suffer").[25] Undeniable that Jefferson, who drafted the Declaration, spoke of Locke as one of the three greatest men ever to live (the others being, interesting enough, Bacon and Newton). Undeniable that James Wilson, one of its principal Framers, spoke of the Constitution as founded on "the revolutionary principle [of] Mr. Locke"; this new Constitution, he said, would establish the first government in history grounded unambiguously on the

true principles of natural right, and "the great and penetrating mind of Locke seems to be the only one that pointed towards even the theory of this great truth."[26] Undeniable that the Founders spoke repeatedly of natural right and the state of nature—which has no place in Thomas's classic natural law—and undeniable that this was, as Jefferson said, the common language spoken by Americans at the time, Federalists and Anti-Federalists alike, including the simple citizens of the various towns north of Boston.[27] Undeniable that, in his explication of the Constitution, Publius (James Madison in this case) spoke of "the Social Compact" and, like Jefferson in the Declaration, of "the transcendent law of nature and of nature's God."[28] Undeniable, I think, that it was Locke's and Montesquieu's view of man's nature that lies behind Madison's famous statement in *Federalist* 10 that the "latent causes of faction are . . . sown in the nature of man." And it is undeniable, finally, that Madison, having said that justice is "the end of government [and] civil society," proceeds to define justice by referring to "a state of nature" and in terms made familiar by Hobbes and Locke.[29]

Again, I could go on, but I think enough has been said to prove that what Murray calls the American proposition is, contrary to what he says, Lockean in origin, not Thomistic. For Thomas, as well as his English counterpart, Richard Hooker, the natural law is grounded on the eternal law—which is to say, on God himself, or on his providence or governance—and derives its strength ultimately from the threat of divine punishment but immediately (and necessarily) from the more evident threat of civil punishment. The reason for this derives from the fact that while the first principles of the natural law are (or are said to be) promulgated and known to all men, insofar as they are rational, those principles alone are not sufficient guides for human action. This means that the natural law has to be supplemented by civil law, which, modeled on the natural law, provides a surer guide to virtuous action. The existence of such a natural law rests on certain presuppositions, generally an understanding of human nature bound up with a teleological view of the universe.[30]

I shall not—indeed, I am not qualified to—enter into a discussion of whether natural law is possible without those presuppositions. Nor shall I enter into a discussion of the political consequences—most importantly, the possibility of constitutionalism—if, as is widely assumed, modern science has made it impossible to believe in a teleological universe or, stated

otherwise, if Nietzsche was right about the death of God—"Nature's God," as well as the God of Revelation.

My objective is to consider whether judges are justified in declaring laws unconstitutional because they conflict with the natural law. I take this to mean the premodern natural law which, I have implied, was rejected by the Framers of the Constitution in favor of the laws of nature as defined by Thomas Hobbes and John Locke. The natural law they rejected directs men's action, by means of commands and prohibitions, toward a variety of ends which possess a natural order, "ascend[ing] from self-preservation and procreation via life in society toward knowledge of God."[31] According to this premodern natural law, self-preservation is a duty (which means suicide is forbidden), but according to Hobbes and Locke, it is a right (which, as I indicated above, means one may murder his executioner). These new laws of nature (mere deductions from the fundamental right of nature to preserve ourselves) simply direct us to seek peace by entering into a contract with others, according to which we enter into civil society and agree to surrender our natural rights or powers in exchange for the civil rights or liberties which are to be secured or protected by government.[32] Thus, our natural rights to life and liberty are exchanged for the civil rights—or, in our case, the constitutional rights—not to be deprived of them without due process of law.

But, as Jefferson said, and the religious provisions of the First Amendment imply, our natural right of conscience is not surrendered; we cannot surrender it. This, more than any other principle or provision of the Constitution, characterizes the American system of self-government: The laws may deprive us of life and liberty but not of the right to pursue the happiness we define for ourselves. In this respect, which can rightly be said to be the decisive respect, we are governed by ourselves, not by the law. In a word, rather than taking its bearings from a natural law that prescribes the means to the various ends given by nature—a law that tells us how to live our lives—the government of the United States is obliged to leave us alone.

But if, under the Constitution, the Congress is forbidden to take cognizance of the natural law when it legislates, does it not follow that the judiciary is forbidden to take such cognizance when it adjudicates? And given the fact that the traditional natural law rests on presuppositions that no contemporary judge—or, at least, none known to me—would accept, is it not likely

that any judicial reference to such a law is, as Justice Black said it was, simply a cloak for what the judge thinks governmental policy ought to be?

III

The Ninth Amendment speaks not of natural law but, instead, of the rights "retained by the people." In line with this, nowhere in his forty-nine-page introduction to the volume he edited on the Ninth Amendment does Randy E. Barnett make any reference to natural law; so far as I know, he does not even employ the term.[33] Instead, and quite properly in my judgment, Barnett addresses the two questions that arise from the Ninth Amendment: What are these unenumerated rights, and are they justiciable?

The Bill of Rights was intended to impose restrictions only on the federal government. This means that it was only the federal government that was forbidden "to deny or disparage [the other rights] retained by the people." However, beginning in 1925, the Supreme Court incorporated most of the provisions of the Bill of Rights, including, presumably, the Ninth Amendment, into the due process clause of the Fourteenth Amendment, thereby making them applicable as restrictions on the states as well as on the federal government.

I note that, to the extent the Ninth Amendment has been invoked by the Supreme Court, this has been done only in state cases, never, to my knowledge, in a case involving federal legislation. I am impelled to ask, why not? Is it that Congress has never enacted a law that can be said to have deprived a person of an unenumerated right? That, to coin John Marshall's phrase, "is too extravagant to be maintained." Is it, then, that the justices do not dare to invoke an unenumerated right to strike down a provision adopted by both houses of Congress and signed into law by the president of the United States, in short, a law enacted by a national constitutional majority?

Writing in *Federalist* 78, Alexander Hamilton said that "it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the [written] Constitution, where legislative invasions of it had been instigated by the major voice of the community." I suggest that more than fortitude would be required of the judges to invalidate such legislation by invoking a right nowhere specified in the Constitution.

It seems to me that any Ninth Amendment argument worth its salt must address the question of whether the Framers intended the judiciary to exercise such an extraordinary power. Such consideration might begin by noting what the Framers did *not* do—for example, they did not *expressly* authorize any kind of judicial review, and they repeatedly rejected Madison's call for a council of revision with the authority to "examine every act of the National Legislature before it shall operate"—and what they *did* do. For example, they contrived to have the country governed by carefully structured constitutional majorities, and authorized these majorities to "make all Laws which shall be necessary and proper for carrying into Execution the [previously delineated] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Did they also authorize the judiciary to override these laws by substituting a definition of necessity and propriety found in a right "retained by the people" or, as Professor Barnett's critics would have it, in the "bottomless well" or the "Pandora's box" of the Ninth Amendment?

If, to quote Marshall again, this "is too extravagant to be maintained," what was the purpose of the Ninth Amendment? I am obliged to address this question, if only briefly.

In the course of shepherding the Bill of Rights through the House of Representatives in the First Congress, Madison asked whether it could not fairly be said that the amendments proposed by the House committee (on which he served) were not, with exceptions he noted, the amendments demanded by the various state ratifying conventions.[34] What he neglected to mention was an amendment proposed by New York, Massachusetts, North Carolina, Rhode Island, and, especially, his own state of Virginia. This was an amendment acknowledging a right that without question everybody at the time understood to be fundamental: the right to reserve rights, or, stated differently, the right of the people to decide *whether, how,* and *where* or *by whom* they shall be governed; in short, the right exercised by the people in 1776.

During the Virginia ratification debates, Patrick Henry, the most prominent of the Anti-Federalists, said, "There are certain political maxims, which no free people ought ever to abandon. . . . That all men are by nature free and independent, and have certain inherent rights, of which, when they enter into society, they cannot by any compact deprive or divest their posterity."[35] His

colleague, Edmund Randolph, made the same point: What was needed in a bill of rights was a "perpetual standard . . . around which the people might rally" if or when the legislature should violate the limits of its powers. In other words, the Constitution should remind the people of their ultimate sovereignty, or their right "to alter or abolish" a government that, in their judgment, had violated the trust bestowed on it, or, as still another Virginian put it, to renew or give it a "fresh spring at stated periods." A statement of this sort was put at the head of the Virginian constitution, so why not, he asked, at the head of this constitution of the "general confederation"?

Madison, and the Federalists generally, did not disagree with the principle, but, as Herbert Storing has demonstrated in his definitive study of the origins of the Bill of Rights, Madison especially was determined that a statement of that principle not be given a prominent place in the Constitution. "Recurrence to first principles," Storing writes,

> does not substitute for well-constituted and effective government. In some cases, it may interfere. Does a constant emphasis on unalienable natural rights foster good government or a sense of community? Does a constant emphasis on popular sovereignty foster responsible government? Does a constant emphasis on a right to abolish government foster the kind of popular support that any government needs? The Federalists did not doubt that these first principles are true, that they may be resorted to, that they provide the ultimate source and justification of government. The problem is that these principles, while true, can also endanger government. Even rational and well-constituted governments need and deserve a presumption of legitimacy and permanence. A bill of rights that presses these first principles to the fore tends to deprive government of that presumption.[36]

If my reading is correct, that "perpetual standard," or that statement of first principles, was not pressed "to the fore"; it was not, as in the case of Virginia, placed at the head of the Constitution; rather, it was consigned to the Ninth Amendment. There, but in a much less conspicuous place, and in language much more sober than Patrick Henry's, it serves as a reminder to the people that they are the source of the powers exercised by government.

It is of some interest to note that the people of Virginia claimed to be exercising this right in 1861 when they adopted an ordinance repealing the ordinance of June 25, 1788, ratifying the Constitution—in a word, when Virginia pretended to secede from the Union. The right to consent to government, they said, implies the right to withhold that consent and to withdraw that consent. Such a right, they said, was expressly recognized in the Ninth Amendment.[37]

The fact that the Ninth Amendment was cited in the secession debates, and that the debates in all the seceding states were filled with statements to the effect that the right to withdraw consent is *the* fundamental right retained by the people, does not *prove* that my reading of the amendment is correct; but what was said in those debates does bear an uncanny resemblance to what was said in 1788 by Patrick Henry, Samuel Adams, and the other Anti-Federalists in their call for a bill of rights.[38] If this, then, is what they meant by a right "retained by the people," it is a right that was adjudicated not in any court, state or federal; it was adjudicated (so to speak) on the battlefield.

3

Preserving a Living Constitution

That federal judges might do what is now claimed they have a right to do was foreseen by some of the Anti-Federalists, particularly "Brutus," who gave it as one of the reasons why the Constitution should not be ratified. The Court, he said,

> will be authorised to decide upon the meaning of the constitution, and that, not only according to the natural and ob[vious] meaning of the words, but also according to the spirit and intention of it. [The judiciary will] be exalted above all other power in the government, and subject to no controul.[1]

Alexander Hamilton, writing in *Federalist* 81, did his best to dispel this fear. There is not, he said, "a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State." Within a decade, however, Brutus's fears proved justified.

First Invocation of Extraconstitutional Principles

The first invocation of extraconstitutional principles came in *Calder v. Bull* (1798), where the Court held that an act of the Connecticut legislature setting aside a probate court decree was not an ex post facto law and, therefore, not void under article 1, section 10, of the Constitution. Having delivered that judgment, Justice Samuel Chase, in what can only be described as *dicta*, went on to say that state authority is limited not only by express

constitutional prohibitions but by the "first principles of the social compact."[2] While agreeing with the Court's judgment in the case, Justice James Iredell took strong exception to this statement of judicial power. "It is true," he said, "that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any court of Justice would possess a power to declare it so." Both the state and the federal constitutions, he pointed out, have defined with precision the objects of the legislative power and have restrained its exercise "within marked and settled boundaries." He continued,

> If any act of Congress, or of a Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject.[3]

There is little question but that on this point Iredell was expressing the view of the Framers, and that they held this view largely for the reasons he gave, reasons as compelling—indeed, as I argue, more compelling—now as then.

True, on one occasion, even John Marshall seemingly acknowledged the right of the Supreme Court to appeal to something akin to "natural justice" when declaring a statute unconstitutional. Announcing the judgment of the Court in the politically explosive case of *Fletcher v. Peck*, he said, "The state of Georgia was restrained [from passing the law in question] either by general principles, which are common to our free institutions, or by the particular provisions of the constitution of the United States"; this, he said, was the "unanimous opinion of the court."[4] But Marshall cannot fairly be cited by the proponents of what we have come to call an "activist" court. In his opinion, Marshall himself relied solely on an express provision of

the Constitution; the Georgia law, he argued, was one "impairing the Obligations of Contracts" in violation of article 1, section 10.

It was Justice William Johnson, alone among the seven justices who sat on the case, who had recourse to the idea of natural justice. "I do not hesitate to declare," he said in a concurring opinion, "that the state does not possess the power of revoking its own grants," but, he added, "I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the Deity."[5] It would appear that Marshall felt compelled by the political situation to announce an opinion that had the support of a "unanimous" Court, and that it was this necessity that led him to refer to "general principles" in addition to an explicit provision of the Constitution.

Beyond *Calder v. Bull* and *Fletcher v. Peck*, there were even occasions—and long before the advent of contemporary "activism"—when the Court struck down state laws without any reference whatever to the Constitution. Prominent among these is a Kansas municipal bond case, *Savings and Loan Association v. Topeka.* Kansas law permitted municipalities to issue bonds and use the proceeds to attract industry to the cities. Speaking for the Court, Justice Samuel F. Miller held the law to be a form of "robbery," a taking of private money (in the form of taxes) to use not for a public purpose, but to bestow it instead on "favored [private] individuals." This, he said, "is not legislation [but rather] a decree under legislative forms."[6] This led Justice Nathan Clifford to protest that "Courts cannot nullify an Act of the State Legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the Constitution, where neither the terms nor the implications of the instruments disclose any such restriction."[7]

"Natural Justice"

Put simply, the idea that judges are entitled to rest their decisions on the principles of "natural justice"—or any of its modern synonyms—is incompatible with the Framers' idea of a written constitution. With a written text, they held, comes certainty, and with certainty comes legitimacy; and both certainty and legitimacy are put in jeopardy by rules of constitutional

construction that, in effect, permit the judges to do as they will. James Madison even found reason to complain (albeit mildly) of Marshall's opinion in *McCulloch v. Maryland*:

> It was anticipated I believe by few if any of the friends of the Constitution, that a rule of construction would be introduced as broad & as pliant as what has occurred. And those who recollect, and still more those who shared in what passed in the State Conventions, thro' which the people ratified the Constitution . . . cannot easily be persuaded that the avowal of such a rule would not have prevented its ratification. . . .
>
> There is certainly a reasonable medium between expounding the Constitution with the strictness of a penal law, or other ordinary statute, and expounding it with a laxity which may vary its essential character, and encroach on the local sovereignties with which it was meant to be reconcilable.[8]

If, as he said in a subsequent letter, the judges are not guided by the sense of the people who ratified the Constitution, "there can be no security for a consistent and stable, more than for a *faithful* exercise of its powers" (emphasis added).[9] The legitimacy of government depends on adherence to the written text, the text that the people ratified or to which they gave their consent; so, too, does the possibility of limited or constitutional government.

The classic statement of these propositions can be found in Marshall's opinion for the Court in *Marbury v. Madison*: The "whole American fabric has been erected," he wrote, on the principle that government derives from and is dependent on the will of the people. "This original and supreme will organizes the government, and assigns to different departments their respective powers." In the American case, it also assigns limits to those powers, and "that those limits may not be mistaken or forgotten, the constitution is written." It was for this reason that he (and, he suggested, all Americans) deemed a written constitution to be "the greatest improvement on political institutions."[10] Thomas Jefferson made the same point when he said that "the possession of a written Constitution [was America's] peculiar

security."[11] As for the judiciary, its duty was to serve as its "faithful guardians."[12]

Statements of this sort abound in the literature of the time:

- "In a government which is emphatically stiled a government of laws, the least possible range ought to be left for the discretion of the judges."[13]
- "If the constitution is to be expounded, not by its written text, but by the opinions of the rulers for the time being, whose opinions are to prevail, the first or the last? [And if the last] what certainty can there be in those powers [which it assigns and limits]?"[14]
- "Would it not make the constitution an instrument of flexible and changeable interpretation, and not a settled form of government with fixed limitations? Would it not become, instead of a supreme law for ourselves and our posterity, a mere oracle of the powers of the rulers of the day, to which implicit homage is to be paid, and speaking at different times the most opposite commands, and the most ambiguous voices?" As Marshall put it in *Marbury*, the Constitution is to be fixed, made "unchangeable by ordinary means."[15]

These various statements derive from a clear understanding of the principles informing the Constitution. No one governs by the grace of God; God (or "Nature's God") endowed men with the rights of life, liberty, and the pursuit of happiness, but he did not provide them with an effective means by which these rights might be secured. Their security required men to institute government, and, precisely because men are naturally all free and equal, the government derives its just powers from the consent of the governed. Or, to state it otherwise, because men are by nature free and equal, no one may govern another without his consent. In our case, that consent was rendered with and in the Constitution, which was ordained and established by us, "the people of the United States." By doing so, we agreed to exchange the natural right to govern ourselves for the civil right to be governed by laws to which we give our consent. As someone put it,

consent is the needle's eye through which natural rights must pass in order to become the civil rights that government is empowered to secure; thus, what is secured by government is not so much the natural rights to life, liberty, and property, but the civil or constitutional right not to be deprived of them "without due process of law."

The Constitution, then, is a fundamental law and was so described in *Federalist* 78, but it is not a "higher law" in the traditional sense of that term. As Robert Kraynak puts it, "Unlike divine or natural law [the Constitution] does not exist independently of the human will; it is created by the will of the people and may be altered or amended by the people according to preestablished rules."[16] Or, to return to *Federalist* 78, "Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding on themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act."

The Authority of Judges

But the authority denied to the legislature, and denied even to the people (except when they act in the prescribed "solemn and authoritative" manner), is now claimed by our judges. According to Justice William Brennan, popularly said to be the greatest of these, "The genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."[17] And, as he demonstrated in case after case, it was he and his fellow judges who were charged with adapting it.

The temptation to adapt it, to keep it up to date, so to speak, seems to be irresistible, for "conservatives" like Rufus W. Peckham,[18] as well as for liberals like Brennan and William O. Douglas.[19] Indeed, I suspect it would prove to be irresistible even for the most insistent critics of the practice, among whom I include myself. My first published article in the field had to do with *Buck v. Bell*, where the Court upheld a compulsory eugenical sterilization statute.[20] Surely, one would like to think, the Constitution does not permit surgical operations to be performed on unwilling patients. In support of its holding, the Court referred to an earlier case where it had upheld

a statute requiring children to be vaccinated, but is there not a difference between that and a statute requiring adult women to undergo salpingectomies?[21] (As I put it thirty-odd years ago, no smallpox in the one case and no children in the other.) The state program was outrageous. A little investigation would have revealed that *Buck v. Bell* was a "friendly suit" and, therefore, not a case or controversy in the sense of article 3. The Court might have denied jurisdiction, but this would have had the effect of affirming the state court decision upholding the statute. On what ground might the Supreme Court have declared the statute unconstitutional? That it rested on "facts" that could not withstand scrutiny? They surely could not; the state's sterilization program rested on an already discredited Mendelian "recessive gene" theory. But such considerations are relevant in the legislative setting, not (we used to be told) in the judicial.

A little investigation would also have disclosed that some of the advocates of the program were admirers of Adolf Hitler, who, they said, deserved praise for adopting "many eugenic measures, including the sterilization law and other measures to eliminate the non-Aryan element from Germany."[22] But of what constitutional relevance is that? Besides, not all the advocates of sterilization were admirers of Hitler. Then, what about the fact that the law applied only to the (alleged) mental defectives in state institutions and not to the "multitudes outside"? But by reaching all those "similarly situated," the law satisfied what were then understood to be the requirements of equal protection. In the event, the Court dismissed the complaint in a few paragraphs. "Three generations of imbeciles are enough," said Justice Oliver Wendell Holmes for the nearly unanimous Court, and that was that.

Justice Pierce Butler dissented, but without opinion. Rumor has it that, as the only Roman Catholic on the Court, he feared that anything he said would be misunderstood. On what could he have grounded his dissent? A few years later (in 1930), Pope Pius XI issued an encyclical (*Casti Conubii*) declaring sexual sterilization to be contrary to the natural law, and Butler might have been tempted to cite it if the encyclical had existed then. The Constitution, however, does not "enact" the natural law as expounded by the pope or, for that matter, by Thomas Aquinas, any more than the "Fourteenth Amendment [enacts] Mr. Herbert Spencer's Social Statics."[23] What, then, was left to Butler and those of us who opposed the statute, other than some version of emanations radiating from those penumbras

cast by the First, Fourth, Fifth, Ninth, and Fourteenth amendments? As I said, the temptation to go beyond the text of the Constitution appears to be irresistible. It may even be inevitable.

Was it not the great chief justice himself who enjoined us never to forget that it was a constitution we were expounding, "a Constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs"?[24] And what is this but to say that its vitality or viability depends on its adaptability?

The Failure of Congress

In fact, however, as I have pointed out before, Marshall did not say that the Constitution may be adapted to the "various crises of human affairs"; he said that the legislative powers granted by the Constitution are adaptable to meet these crises.[25] And much of what we regard as the inevitability of judicial activism is the result of Congress's failure to use its powers, specifically its powers under section five of the Fourteenth Amendment. Its failure to do so—for example, its failure in the course of time to declare that one of the privileges or immunities of American citizenship is to attend a nonsegregated public school—not only opened the door for the Court but made it *necessary* for the Court to assume a political role; and, as we say, the rest is history.

It is a history of employing constitutional clauses—equal protection and due process especially—in tasks for which they were not intended and are ill-suited, tasks for which the legislative power was intended and is well-suited. To invalidate poll taxes, for example, legislatures, unlike courts, have no need to invoke a principle that, of necessity, they must find either in the text or the interstices of the Constitution; nor do they have to say, as the Court did say, that "the Equal Protection Clause is not shackled to the political theory of a particular era [or] due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights."[26] They have only to decide that, under modern conditions, these taxes serve no useful and legitimate purpose. As Justice Hugo L. Black said in dissent, however, the Court had to invoke the familiar "natural-law-due-process formula," which, he suggested, is simply a "cloak for what it thinks governmental policy should be."[27]

And so it is, and so it necessarily is, except that no one on the Court actually speaks of the natural law, natural justice, or "the first principles of the social compact"—not in our day. Whatever might have been Justice Butler's inclinations when he dissented in *Buck v. Bell,* the traditional natural law rests on presuppositions that no contemporary judge or constitutional lawyer—or, at least, none known to me—would accept.[28] Their education forbids it. What about natural rights, or natural law as understood in the Declaration of Independence?

To justify our independence, we invoked "the Laws of Nature and of Nature's God," but our habit today is not to take that seriously. Even Carl Becker, the author of the one book devoted exclusively to explicating this first of our Founding documents, does not take it seriously. As he would have it, Jefferson and his colleagues appealed to the laws of nature only because they had to appeal to something, and it is pointless to ask whether they were serious in their claims: "To ask whether the natural rights philosophy of the Declaration of Independence is true or false," he says, "is essentially a meaningless question."[29]

Others take it seriously but, in the process, demonstrate their unfamiliarity with the subject—the venerable Roscoe Pound, for example. Hoping to breathe some life into the "forgotten" Ninth Amendment, Pound seizes upon the possibility that, with their reference to the "[rights] retained by the people," the Framers had in mind natural rights or—he tends to confuse them—natural laws.[30] But, an early opponent of the idea of original intent, he is not willing to accept the understanding of these rights or these laws current at the time of the Founding. Instead, he comes up with the idea of mutable rights and laws, mutable but—*mirabile dictu*—still natural. "From this standpoint," he says, "the Ninth Amendment is a solemn declaration that natural rights are not a fixed category of reasonable human expectations in civilized society laid down once and for all in the several sections of the Constitution." And "unlike the law of nature of the eighteenth century," he says, "the revived natural law is not a fixed system of precisely formulated rules to stand fast forever."[31]

As I said, we began in 1776 with an appeal to the self-evident truth that all men are endowed by their creator with certain unalienable rights. It is altogether reasonable to assume that, in 1787–88, when we gave our consent to the Constitution, we understood it to embody, or to be informed by,

the principles of that Declaration, and that we further assumed that occasions would arise when, to decide a case or controversy, it would be necessary *and* appropriate for the Court to invoke them. Which is to say, as it is in the *United States Code* (as well as other official compilations of our laws), we once understood the Declaration to be the first of our "organic laws."[32] Leo Strauss made this point in 1953 when he wrote that "about a generation ago, an American diplomat could say that 'the natural and divine foundation of the rights of man' is self-evident to all Americans."[33] But Strauss went on to cast doubt whether that could still be said in his time. He referred to Germany, where the idea of natural right had been abandoned—where the term itself had become almost "incomprehensible"—and he suggested that this would happen in America. Indeed, if Sanford Levinson is right, that has now happened.

About a hundred years ago, Friedrich Nietzsche, the most influential of German thinkers, pronounced the death of God—"Nature's God," the God of the Declaration of Independence, as well as the God of the Bible—and we are indebted to Levinson, a leading American professor of constitutional law, for his candor when pointing to the consequences of this. "The death of constitutionalism," he declares, "may be the central event of our time, just as the death of God was that of the past century (and for much the same reason)."[34] Nature's God endowed us with rights, and the Founders provided us with a Constitution that, to secure these rights, put constraints on the popular will. With his death, those constraints are deprived of all moral authority. In Levinson's words, "Law is stripped of any moral anchoring," with the consequence that there is nothing "to which the will [is] bound to submit"[35]—no moral order, no moral laws, and, as Nietzsche said, no reason to be burdened by guilt. Levinson claims—and who would contest him?—that his view of our situation is the one "emphasized today at most major law schools"—and not only in the law schools.

The Death of Constitutionalism

We now live in a postmodernist world, and it is important to understand what that implies: constitutionalism is dead. The thought that made it possible is no longer believed. Rationalism is dead. The idea of nature gave way to

history and historicism, then radical historicism, and in our case to "post-modernist" legal thought. And this, as Levinson accurately portrays it and as Thomas L. Pangle pointed out in his review of Levinson's book, "is inspired by the brooding, anti-rationalist, quasi-religious and proto-fascist philosophies of Nietzsche and Heidegger, supplemented by their more recent French and American 'deconstructionist' epigones, Derrida, Foucault, Barthes, de Man and Richard Rorty."[36] There are, I would emphasize, no constitutionalists in this group, and, if Levinson is right, our law teachers, and ultimately our judges, will not be able to escape their influence.

But if constitutionalism is dead, so is the prospect for judicial review. If, as Levinson puts it with commendable candor, "there is nothing that is unsayable in the language of the Constitution,"[37] why should the people and their elected representatives defer to judgments rendered by an unelected judiciary? Levinson can think of no reason why they should, but Michael Perry (in some ways the most thoughtful of the proponents of a "living" constitution) says the judges speak for the people by appealing to their aspirations. The judges, he says, should be guided by the "beliefs or aspirations as to how the community's life, the life in common, should be lived." But he has to acknowledge that "different persons will have different views as to what an aspiration requires," and, this being so, he concludes that "the judge should rely on *her own beliefs* as to what the aspiration requires." How does she form those beliefs? By testing them "in the crucible of dialogic encounter with the wisdom of the past, of the tradition, including original beliefs, precedent, and anything else relevant and helpful."[38] The difference between this and a reliance on personal preferences is not readily discernible, and why the people and their elected representatives should defer to the judges' preferences is not at all evident. Why should they?

But Perry turns the question around. He asks, why are today's public officials "morally obligated to defer to the beliefs . . . of the long-dead and mostly WASP men who ratified the second Constitution—the Civil War amendments"? He says that they are not so obliged, that it is "counterintuitive" to suppose that they are.[39]

Although Perry is a Roman Catholic and I am a latter-day WASP, it is not for that reason that I think this is a matter not to be decided by intuition. Would he think otherwise if the constitutional provision involved was of recent provenance—if, for example, it had been proposed last year by a

convention called by the Congress on the application of two-thirds of the states and consisting of large numbers of non-WASPs? Perhaps, but, assuming the later provision is not intended to repeal the earlier, what is it that gives the provision a greater claim to obedience? On what basis could Perry say that the later convention—acting, let it be noticed, under the authority of a provision adopted by the earlier—enjoys a status denied to the earlier?

Legitimacy and Authority

But let the matter be decided by intuition—the public's intuition—and ask which judge has a greater claim to obedience, the one who points to those five provisions indicating, in one way or another, that the Constitution permits the imposition of the death penalty[40] and, on the basis of this constitutional evidence and despite his own beliefs on the matter, concludes that death is not a cruel or unusual punishment, or the one (Justice Brennan) who, having discerned what he regards as our true "aspirations," decides that the death penalty is unconstitutional? Or, again, which judge has a greater claim to obedience, Justice Antonin Scalia, who concludes that Title VII of the 1964 Civil Rights Act means what it says when it forbids sexual preferences in hiring, or Justice Sandra Day O'Connor, who admits that Title VII has been interpreted, and is being interpreted, "to permit what its language read literally would prohibit," and who goes so far as to say that Justice Scalia had proved this "with excruciating clarity," but, nevertheless, after engaging in some of that Perry moral discourse, concludes that the statute must be read to permit what it literally forbids?[41]

But this is a matter of legitimacy, which cannot be determined by intuition. Whether we can expect legislatures to defer to courts depends ultimately on the right of the people to adopt a constitution for themselves *and* for their posterity, a constitution binding upon themselves and, until "annulled or changed" in the prescribed manner, binding upon their posterity. That, in the words of *Federalist* 78, is the "fundamental principle of republican government." Judges may claim the obedience of other public officials because, and only because, they represent the people in their constituting capacity. Unlike elected officials, their constituents are those "long-dead and mostly WASP men" and, when acting in a "solemn and authoritative"

manner, their living descendants. (Thanks to a series of constitutional amendments, these descendants are not necessarily either WASPs or men.)

The judges must acknowledge this. Even Justice Brennan claims to derive his authority from the Constitution, which, in this one respect at least, retains the meaning it had at the beginning. His decisions may derive from a *living* Constitution, but his authority to render them derives from that good old (in this one respect) "static" Constitution. The question is whether the people will continue to recognize that authority when the judges are no longer willing to limit themselves to enforcing the Constitution as written or, to quote Madison again, if the judges are not guided by the sense of the people who ratified it. I know of no one who has put this better than Fred Baumann:

> The problem created by the doctrine of the living Constitution for the legitimacy of the Constitution is obvious. It is that the Constitution then preserves only a formal existence, that it becomes a kind of moral capital on which the Supreme Court ceaselessly draws but that it can never replenish. As that capital is drawn down, it becomes ever clearer that it is not the Constitution that lives but only its name; consequently neither the Constitution nor the Court deriving its justification from the Constitution can enjoy further legitimacy.[42]

We obviously have not reached that point yet. The idea of constitutionality—and its converse, unconstitutionality—is still accepted by the American people but only, I suspect, because, in their commendable innocence, they continue to believe that it is the Constitution whose provisions the Court is enforcing. One has to wonder what will happen when they come to understand, as Joseph Rauh, a prominent lay proponent of the "living Constitution," wants them to understand, that the "Supreme Court is part of our nation's political process." He says that "the sooner this is accepted as inevitable the better."[43] I doubt that. I think they think that political decisions should be made democratically, by their political representatives whom, under the Constitution, they elect to office and whom they can remove from office. If so, and if the Court were to proceed along the lines traced by Brennan and retraced by Perry, Rauh, and the others, the "living Constitution" is not calculated to enjoy a long life.

4

The Demise of the Constitution

On January 20, 1989, George H. W. Bush took the following oath of office, an oath prescribed in the Constitution itself and, because of that, taken on each of the fifty-nine occasions since George Washington first took it in 1789: "I do solemnly swear . . . that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

What does it mean to preserve, protect and defend—to say nothing of celebrating—the Constitution? Or, to put the question in a manner that suggests more clearly what is to follow, what is it that the president is sworn to preserve, protect, and defend? And why is it important to do so? President Bush did not say. Indeed, in the inaugural address that he then proceeded to deliver, he made no reference to the Constitution; neither, as it turns out, did most of his immediate predecessors or his immediate successors.

It was otherwise in the nineteenth century; only Lincoln and Grant, each in his second inaugural, failed specifically to refer to or speak of the Constitution. In 1825, John Quincy Adams devoted a major part of his inaugural address to it and, in the process, provided us with an understanding of what a president swears to preserve, protect, and defend, and why it deserves to be preserved, protected, and defended. "We now receive it," he said by way of summary,

> as a precious inheritance from those to whom we are indebted for its establishment, doubly bound by the examples which they have left us and by the blessings which we have enjoyed as the fruits of their labors to transmit the same unimpaired to the succeeding generation.[1]

Thanks to him and others—and, of course, especially to Lincoln—the Constitution, with its blessings, has been transmitted to generations even into the twentieth-first century. Thanks to the fact that it speaks only of "persons" and "Indians not taxed"—rather than of black and white, Christian and Jew, European, Asian, and African, noble and plebian, male and female, the Founders' Constitution has made this country a haven "for all sorts and conditions of men."[2] It has, from the beginning, defined a private realm, a realm in which we are free to pursue happiness as we understand it, or, as someone put it, "a realm in which we can tend to the salvation of our [own] souls," one whose existence "makes corruption voluntary to an appreciable degree." This is a Constitution that allows us to choose a government and, within broad limits, to prescribe its business, a government of, by, and for the people. This is a Constitution that is the product of profound *thought* about the failure of earlier republics, about the weaknesses of the first national constitution (the Articles of Confederation), about the conditions of the country, about the people of the United States, about the *thoughtful* objections raised by those who opposed its ratification, and most of all, *thought* about the nature of man and the purpose of government.

The product of that thought has now endured for more than two hundred years, among written constitutions by far the oldest. Consider: at last count—or, at least, at my last count—there were 164 countries in the world, 158 of them with written constitutions, but over half of them written since 1974, a statistic that provides some measure of the problems of constitutional government—and of our good fortune.

For all these reasons, and especially as the country prepared to celebrate, first, its sesqui- and then its bicentennial, one might have thought that presidents would have had something to say about the Constitution when taking the oath of office. But after McKinley, references to it became the exception rather than the rule. Theodore Roosevelt made no mention of it; Taft had something to say about the three post–Civil War amendments, but Woodrow Wilson (who elsewhere suggested that it be abandoned) did not utter the word "Constitution" in either of his inaugural addresses, nor did Harding or Hoover. Coolidge acknowledged it in passing, but Franklin Roosevelt, after a perfunctory reference to it in his third inaugural, spoke of it only in his fourth, and then only to complain of its imperfections. Truman ignored it altogether, as did Eisenhower, Kennedy, Johnson, Nixon (in 1969), and

Reagan (in 1985). As one might expect, considering the conditions surrounding his assumption of office, Gerald Ford referred to the Constitution in 1974, but from Jimmy Carter came not a word about it. Instead, he appealed to the Bible, quoting this passage in Micah 6:8: "He hath shown thee, O man, what is good; . . . and what doth the Lord require of thee, but to do justly, and to love mercy, and to walk *humbly* with thy God." That said, Carter proceeded to walk *proudly* down Pennsylvania Avenue with his wife.

It might appear that the Constitution has gone out of favor, and, sad to say, in some circles it has. In the law schools and, alas, also in the political science departments, the Constitution as written and authoritative text has certainly gone out of favor. This was made manifest by the reaction to the nomination of Robert Bork for a seat on the Supreme Court in 1987. To say nothing of my colleagues in political science, whose views were similar but not formally publicized, some 1,925 law professors—surely a good proportion of the total—publicly opposed his appointment, and took the trouble of communicating their opposition to the Senate Judiciary Committee. Bork, they said in one way or another, was out of the academy's "mainstream," as surely he was, and is.

Bork counsels fidelity to the Constitution as written and ratified by the people; which is to say, he sees the Constitution as *law*, "a superior paramount law, unchangeable by ordinary means," as the great Chief Justice John Marshall put it, law binding judge as well as legislator and executive.[3] But according to today's "mainstream" lawyers, the Constitution is a mere "epiphenomenon," and no one can be bound by an epiphenomenon. As one of them said, rather than carry any precise meaning that judges are bound by oath to recognize and obey, the most important constitutional provisions "do *not* rule out any answer a majority of the Court is likely to want to give."[4] Social, historical, and economic conditions—as seen by the judges—take precedence over the Constitution's written text, and they may dictate any outcome. Thus, as we are told by another "mainstream" academic lawyer, "There is nothing that is unsayable in the language of the Constitution." Nothing in it, not even the precise language of the Fifth Amendment, stands in the way of a statute taking "private property without [just] compensation," or compensation of any sort; none of its provisions forbids even "the establishment of a proletarian dictatorship" that would deny political rights to all but "proletarians and/or party members."[5]

Some "mainstream" lawyers go further. Rather than toy with the Constitution's text, they see it as lacking moral principles, and would consign it to the scrap heap. Whereas Bork has said the sole task of the judge "is to translate the [Framers'] . . . morality into a rule to govern unforeseen circumstances,"[6] they accuse the Framers as being, at best, morally indifferent. This is the view popularized by Ronald Dworkin, one of Bork's principal opponents. What is required, Dworkin has said, is a "fusion of constitutional law and moral theory, a connection that, incredibly, has yet to take place."[7]

One might protest that a Constitution that secures the rights of man—the *equal* rights of man—is not lacking in moral principle. But consider Madison's statement in *Federalist* 10, to the effect that the first object of government is the protection of different and unequal faculties, including the different and unequal faculty of acquiring property. Protecting the equal rights of unequally endowed men can only lead to inequality, not of Madisonian rights, but of wealth, position, rank. Is this not unjust? Manifestly so, by contemporary academic standards. Securing these rights leads to distributive injustice, to coin a phrase. Madison did not take rights seriously; he was not a genuine egalitarian; he made no provision against the Rockefellers of this world, to say nothing of the Donald Trumps.

Taking rights seriously—which is the title of Dworkin's book—leads to an egalitarian constitution under which there would be no Donald Trumps but, to adopt Dworkin's term, there would be trumps, of the sort known to bridge players. These would be dealt by the government to those who, for whatever reason, do not do well in the game of life, including the less talented, who deserve a better hand than nature dealt them. They have a right to some form of redistribution, he insists, and to "equal concern and respect," which, in his scheme, is the foundation of all rights.[8]

Dworkin calls them natural rights, thereby endowing them with a stature in addition to that gained by association with his name, but, on the face of it, they seem to be designed to work against nature or to remedy what he regards as the injustices of nature. Their source is in John Rawls's "original position," not in John Locke's state of nature; and unlike Locke and his predecessor Thomas Hobbes, Dworkin makes no attempt to demonstrate that they are intrinsic to man as man. He simply adopts the term because it's a convenient "assumption," a convenient foundation for his "conception of fairness." These rights depend on a hypothesis—his

word—that "the protection of certain individual choices [is] fundamental." Thus, the refashioned constitution would be built on rights coming from a hypothesis, not on "unalienable rights" coming from "Nature's God," which Dworkin dismisses as a "preposterous notion."

But what is to be said of a natural right contrived in defiance of nature? Dworkin may dismiss the Founders' idea of human nature as "preposterous," but he cannot deny that nature distributes talents or faculties unequally; such differences were evident to James Madison and the other Framers, and, like it or not, they are evident to Dworkin—evident but, as he would have it, "morally irrelevant." But are they, these natural differences, *politically* irrelevant? Can they be ignored when framing a government?

What does Dworkin propose to do with the exceptionally talented? He denies them any knowledge of their talents. He asks, what sort of society would reasonable men choose to live in? To answer this question, and following John Rawls, he puts them—the naturally talented and the others—behind an imaginary "veil of ignorance."[9] There, eager to possess a great deal of what society has to offer—rank, esteem, or wealth, for example—but ignorant of what nature has bestowed on them by way of talents and, therefore, of what society is likely to give them by way of rank, esteem, and wealth, they would, being reasonable, choose a society that distributes these goods more or less equally. They would do so out of the fear that, if they had to compete for them, they would end up with less. In this way, nature would be thwarted.

Still, one must wonder whether it would, in practice, work out this way. Are there not likely to be a few men, even behind that "veil of ignorance," who would be willing to take a chance—especially since the alternative offered by Rawls and Dworkin might appear unspeakably dreary to them? So why not opt for equality of opportunity? Why not opt for the American way?

Even so, when the veil has been lifted, as it would be once the society is in being, would those who prove to be naturally talented not be tempted to rebel against Dworkin's dispensation? Dworkin may say that it is naturally right for them to be content with an equal share—after all, they would have voted for it—but the naturally talented are not likely to be satisfied. They would be inclined to say that a contract made in ignorance is not a legal or binding contract. And since they would not yet have been deprived of their passions, they would be very likely to rebel, especially since

Dworkin endows them, and everybody else, with a constitutional right to disobey the law.

Much the same can be said of the constitution favored by still another "mainstream" lawyer, Bruce Ackerman of the Yale Law School. Although he is critical of Rawls (and by implication, Dworkin), Ackerman manages to reconstruct the Constitution and come up with a liberal state that is, on the whole, similar to the one favored by them, even though he claims his is the first to be based on a purely relativistic principle. On it he builds his egalitarian state. Justice for him is treating everyone alike. He demonstrates this by means of a series of dialogues which, in a way, serve the same purpose as Rawls's and Dworkin's "veil of ignorance." Just as they deprive persons of any knowledge of their talents when they constitute society, he excludes the arguments of the talented from inclusion in his dialogues; each of his participants must acknowledge the principle, "I'm at least as good as you are." From this "constrained conversation," as he puts it, he arrives at a liberal state that refuses to treat any "lifestyle" as superior to others because all are arbitrary. For Ackerman, authority means authoritarian and "coercive," so he's against it, even (except during the earliest years of a child's life) the authority of parents and, of course, the authority of teachers and school boards. "As the child gains increasing familiarity with the range of cultural models open to him in a liberal society," he writes, "the choice of his curriculum should increasingly become his responsibility, rather than that of his educators."[10]

Let a thousand flowers bloom. But will they? And will what blooms be flowers? Tocqueville, for one, would have doubted it. Aiming at no place in particular, this liberal society will, and will willy-nilly, get someplace, and, if Tocqueville's—and, for that matter, the Founders'—vision was true, there is no reason to be complacent about the kind of place it will be. The society that thinks pushpin is as good as poetry (to borrow Clifford Orwin's phrase) will end up with a lot of mediocre pushpin and a little mediocre poetry. From the Founders' perspective, that would be a very dreary prospect indeed.

But never mind about the Founders; they're dead and gone—and discredited. What about their likes today? Would they be willing to accept this dispensation? The talented presented no problem for Ackerman when he designed his brave new world—he simply deprived them of a voice in his constituting dialogues—but what would he have to do to get them to live

in it? Unlike Dworkin, he can't even say they voted for it and are, therefore, obliged to accept it. To put the question generally, how does Ackerman propose—in practice—to rectify what he sees as the injustices of nature? And nature, I repeat, discriminates; not with respect to rights, with which we are equally endowed, but with respect to mental faculties and physical attributes. With respect to these we are not equal—a fact that might be ignored in our books, but not in our politics.

Here, like Allan Bloom on a similar occasion, I think of Herodotus's account of a Babylonian law by which all the marriageable girls were auctioned off; the beautiful ones brought high prices from the rich and voluptuous men, and the city used the money so acquired to provide dowries for the ugly girls. In this way, the naturally unattractive were made attractive. But thanks to modern science, we can do better than that. By means of genetic engineering, we can make everyone look alike.

Of course, such means cannot be adopted by our government as presently constituted; but constitutional government—indeed, the very idea of constitutionalism as we have understood it since 1776—is now said to be dead. Its death is announced by Sanford Levinson. "The death of 'constitutionalism,'" Levinson writes, "may be the central event of our time, just as the death of God was that of the past century (and for much the same reason)."[11] Indeed, constitutionalism is dead precisely because God, even "nature's God," the god of the Declaration of Independence, is dead. Nature's God endowed us with rights and, through the agency of the Founders, provided us with a Constitution that, in order to secure those rights, put constraints on the popular will, which they understood to be the egalitarian will. With his death, those constraints are deprived of all moral authority—in Levinson's words, "Law is stripped of any moral anchoring"—and we are left with nothing but will. Nothing is left to guide the will; no "constraints of a common moral order to which the will [is] bound to submit."[12]

This leads me to my conclusion. The task assigned by the Framers to the Supreme Court was not an easy one. The judges were to be the "faithful guardians of the Constitution," and this would require of them "an uncommon portion of fortitude." It would, of course, require of them more than that. According to the same Framers, "A constitution is, in fact, and must be regarded by the judges as, a fundamental law [and] it therefore belongs to them to ascertain its meaning."[13]

Thus, care of the Constitution was put in their hands, but nothing was done, or could have been done, to ensure that when interpreting it, they remained persuaded of the truth of its principles. Resting on, derived from, political theory, the Constitution was vulnerable to changes in the world of theory. In the last letter he is known to have written, Thomas Jefferson could say that "all eyes are opened, or opening, to the rights of man"; but there was no guarantee that they would stay open, or, even if open, that they would remain fixed on the rights of man. Felix Frankfurter, himself a famous Supreme Court justice, and before that a famous Harvard law professor, praised Oliver Wendell Holmes for bringing philosophy to the Court and, therefore, to the Constitution, but Holmes's "philosophy" was not that of the Framers; and in the fifty-odd years since he left the bench, we have moved some distance along the path he marked out, and some further distance from the world of the Framers.

Yet, in form at least, we still live under the Framers' Constitution, and I suppose that every four years—and sometimes more frequently—presidents will continue to take the oath to "preserve, protect, and defend" it. But its substance is, to a large extent, in the hands of the justices and, ultimately, in the hands of the schools where they learn their law, or their jurisprudence—and, alas, I have to confess, their political science, for what I said about the law schools could also be said of the political science—and, indeed, the history—departments. Thus, the Constitution presidents will be under oath to defend may turn out to be a Constitution not worth defending.

5

Solving the Problem of Democracy

What is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

—*Federalist* 51

Some years ago, before an audience of federal judges and law professors, I said that there probably was not a law school in the United States that did not offer a course in constitutional law, or many that did not make it a part of the required curriculum, but that, so far as I knew, none had a course on the Constitution itself. With a few conspicuous exceptions, the same was true of political science departments. There, as in the law schools, professors focused on the decisions handed down by the courts, mainly by the Supreme Court of the United States, differing from their law school colleagues only in their reasons for doing so.

The law professors were in the business of training practitioners who would need to know how to advise their clients (including, perhaps, government officials) and to try cases. Their emphasis, therefore, was on the law of those cases. The political scientists were interested in the factors that led, or might have led, to the decisions; as "scientists," they wanted to be able to predict the outcome of future cases. Their emphasis, therefore, was on judicial behavior, which they attempted to explain by quantifying the factors that, they thought, might enter into it.

Lost in all this was any interest in constitutionalism. Those who ought to have been professionally concerned with it seemed to have taken it for granted. (After all, the United States had lived under the Constitution for more than two hundred years. So what was the problem?) Pressed to define constitutionalism, they would have been nonplussed; few made the effort, and fewer still studied it.

This indifference may have been inevitable; Tocqueville seems to have thought so. What is constitutionalism but formal government? And, as he points out, democrats—and American professors are surely democrats—are distrustful of forms and do not comprehend their utility. They aspire to easy and present gratifications, he says, and are exasperated by anything that stands in their way:

> Yet this objection which the men of democracies make to forms is the very thing which renders forms so useful to freedom; for their chief merit is to serve as a barrier between the strong and the weak, the ruler and the people, to retard the one and to give the other time to look about him. Forms become more necessary in proportion as the government becomes more active and more powerful. . . . Thus democratic nations naturally stand more in need of forms than other nations, and they naturally respect them less.

This, he concludes, "deserves most serious attention."[1] That it received such attention at the beginning of the United States should be evident to anyone who takes the trouble to study the records of the convention that framed the Constitution and the debates (which were vigorous and extensive) surrounding its ratification. My task here is to explain the product of those deliberations and the problems it was intended to solve, in the opinion (an opinion emphatically confirmed by South Africa's experience in drafting a new constitution in the 1990s) that those problems were not, and are not, unique to America.

America's Good Fortune

Beginning in the autumn of 1787, Americans were asked to deliberate on, with a view to ratifying, a new constitution for the United States. "The subject speaks its own importance," we read in *Federalist* 1,

> comprehending in its consequences nothing less than the existence of the UNION, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world.

Nor would these consequences be confined to America; not, at least, according to the authors of *The Federalist*:

> It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.[2]

Now, some two centuries years later, we can say that America did set an example, and that many, indeed most, countries have followed it. How many have profited from it is, however, another question. By my last reckoning (undertaken before the breakup of the Soviet Union and Yugoslavia), there were 164 countries in the world, all but 6 of them with written constitutions—the exceptions were Britain, New Zealand, Israel, Saudi Arabia, Oman, and Libya—but of those 158 written constitutions, over half had been written since 1974; and in the period when America has had one constitution, France has had five. (And, as the old joke has the Paris taxi driver saying, "*Il y aura une sixième* [There will be a sixth].")

Although some may question how much the world has learned or, to be fair, can learn from the American example, without question Americans stand to learn much from the experience of other peoples. They can, for example, learn to appreciate their Constitution, and, incidentally, how much its success is the product of the favorable circumstances that attended its birth.

This fact was acknowledged by Publius, the pseudonymous author of *The Federalist*. The country was geographically united, he said, bound by navigable waters that facilitated communication and commerce, and blessed with a variety of soils and productions watered "with innumerable streams for the delight and accommodation of its inhabitants."[3] This passage comes to mind when we read of drought and its attendant starvation in places like Somalia.

Publius then points out that, in addition to its material blessings,

> Providence [had] been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established their general liberty and independence.[4]

I recall this passage whenever I read of events in what was once Yugoslavia, where the Christian Serbs seem determined to annihilate the Muslims in Bosnia-Herzegovina; in Iraq where the government waged war on its own Kurds and Shiites; in what was once Czechoslovakia; in Nagorno-Karabakh and Georgia, and other parts of the once mighty Soviet Union; or, for a final example, in strife-ridden Cambodia.

Indeed, I have had occasion to recall this passage whenever I have, in one way or another, participated in discussions of constitutional matters in other countries:

- In Cyprus, for example, where in 1979 Professor Daniel Elazar and I were in Nicosia to discuss federalism in a country where Greeks and Turks were (and still are) separated by a line drawn across the breadth of the country, a line that was (and still is) being patrolled by a United Nations peacekeeping force.

- In Brazil where, in 1987, after listening to what I had to say on the subject of constitution-making, a member of the audience denounced the organizer of the program for inviting an American

> to speak on that subject. "What," he asked, "can we learn from America? In two hundred years they've had only one constitution. Why not a Bolivian? They've had a hundred."

(No doubt many factors have contributed to the longevity of our Constitution—not the least of them, lest we forget, being the Union victory in our Civil War—but the good luck that attended its birth is surely one of them.)

And, most recently, in South Africa, where the discussion of a new constitution necessarily involved the role (almost surely disruptive) of political parties. In this respect, also, America was fortunate. As Publius says, the convention that drafted the Constitution of the United States "must have enjoyed, in a very singular degree, an exemption from the pestilential influence of party animosities—the disease most incident to deliberative bodies and most apt to contaminate their proceedings."[5]

Indeed, unlike every other country that has attempted to write a constitution since America set the example in 1787, the question of who was to participate in the convention charged with writing it simply did not arise in the United States; it was not an issue. It could not be an issue. Contrary to the objection raised by that angry Brazilian, America has had two constitutions, and under the first of them—the so-called Articles of Confederation and Perpetual Union—the United States then consisted of thirteen quasi-sovereign states. There was, therefore, no question but that the convention of 1787, if it were to meet, would be, and could only be, a meeting of those states, each choosing its own representatives (and in whatever number it chose), and each state casting one vote. The importance of this should not be minimized. All the preliminary issues that have plagued the constitution-making process in other countries—who would be represented, and in what numbers, and with what authority, and where the convention should meet, and for how long, and in what language (or languages) the deliberations should take place, to say nothing of the question of whether they should be secret, closed to the press—were absent in the United States in 1787.

America was especially lucky—and again the comparison with South Africa in drafting its 1996 constitution is telling—in that its people were one people. They were one not only because they spoke the same language, professed the same religion, were attached to the same principles of government,

and were very similar in their manners and customs, but, as Publius emphasizes, they were united by a common enemy defeated in "a long and bloody war"—not just a common, but a foreign, enemy. Abraham Lincoln was to make much of this fact in the first of his major speeches. Speaking of the period immediately after the American Revolution, he pointed out that

> the deep rooted principles of *hate*, and the powerful motive of *revenge*, instead of being turned against each other, were directed exclusively against the British nation. And thus, from the force of circumstances, the basest principles of our nature were either made to lie dormant, or to become the active agents in the advancement of the noblest of cause [sic]—that of establishing and maintaining civil and religious liberty.[6]

Americans should bear all this in mind (and be humbled by it) whenever they address the subject of constitution-making in other countries, for no other country is now blessed as America was blessed at its beginning. In fact, it is no exaggeration to say that, among all the countries that have attempted to constitute (or, in the typical case, reconstitute) themselves, only the United States was given the opportunity to make a truly new beginning. Unlike France, for example, it did not continue to find itself with a sullen nobility, dispossessed by the revolution of its property and its privileges but not of its hopes for their recovery under a restoration of *un ancien régime*. Tocqueville acknowledged one aspect of this when he said that the "great advantage of the Americans is that they arrived at a state of democracy without having to endure a democratic revolution, and that they [were] born equal instead of becoming so."[7]

Nor was the United States faced with what Karl Marx would later call a proletariat nursing its legitimate grievances and thirsting for revenge. As Tocqueville said, there was no proletariat in America.[8] There was, of course, a large number of Africans enslaved under the laws of the states (almost exclusively the southern states), but unlike the Xhosas, Zulus, and certain other inhabitants of South Africa today who have some political power, they had neither political power nor, for well into the nineteenth century, a political voice.[9] As for the Indian tribes native to the North American continent, their presence, unlike that of the slaves, was noted in the Constitution, but

only as an alien people with whom the government might enter into treaties.[10] (These treaties had to be written and rewritten as the Indians were pushed ever farther westward, even as the Xhosas were pushed back first beyond the Great Fish and then the Keiskamma and Great Kei rivers.) Still, while America may owe the relatively easy adoption of the Constitution to those circumstances, it owes its subsequent prosperity, security, and stability to that Constitution—and to the handful of men who drafted it and secured its ratification. As I once wrote,

> Some were unknown (and remained so), but most of them came not as strangers to each other. The more distinguished among them especially had worked together in the Congress or army and, even when that was not the case, knew each other by reputation. They were a remarkably learned and talented group of men. Even Richard Henry Lee, who did his best to prevent the ratification of the Constitution, acknowledged that "America would probably never see an assembly of men of like number more respectable."[11]

They included James Madison, James Wilson, Benjamin Franklin, Alexander Hamilton, Gouverneur Morris, John Rutledge, Oliver Ellsworth, and, presiding over their deliberations, George Washington. (Thomas Jefferson, in Paris at the time, referred to the convention as "an assembly of demigods.")[12]

Perhaps the most important consideration—and here again the contrast with South Africa is significant—was that they not only knew each other but, with very few exceptions, and despite the sharp divisions engendered especially by the slavery issue, they trusted each other and had reason to do so. They understood the problems they faced and designed a government capable of dealing with them. These problems were not unique to the United States; indeed, they were similar to those faced by South Africa in drafting its new constitution.

Principles of Government

The Framers of the Constitution had no illusions that their task was an easy one. The country's geographical isolation would not, by itself, protect it from

foreign enemies; the Constitution would have to make provision for its defense. Thus, Congress was given the power "to declare war, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"; "to raise and support Armies"; "to provide and maintain a Navy"; "to provide for calling forth the Militia to execute the Laws of the United States, suppress Insurrections and repel Invasions"; and the president was made "Commander in Chief of the Army and Navy . . . and of the Militia of the several States, when called into the actual service of the United States."

In the event, these provisions proved to be adequate. Although sorely tested on occasion, especially during the Civil War, they allowed for the defense of the nation without—or only once—jeopardizing the liberties of the people.[13]

Then, although it was true that almost all Americans professed Christianity, the Framers knew that this was no guarantee that America would be free of sectarian warfare. To guard against it, they consigned religion to the private sphere by separating church and state. They did this by providing that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States," and by forbidding Congress "to make any law respecting an establishment of religion, or prohibiting the free exercise thereof." In this way, they hoped to take religion out of politics.

What is true respecting the problem of national defense is equally true respecting the religious problem. Compared with other times and places, America, during the entire course of its history under the Constitution, has been remarkably free of religious strife—without (if the public opinion polls are to be believed) the people becoming irreligious.

The problem of most concern to the Framers, and the one whose resolution required their greatest attention, had to do with the principles of government. In fact, even at the beginning there were sharper differences respecting these principles than Publius would have us believe. He conveniently neglected to mention that at the time of the Revolution, about 20 percent of the population—or approximately five hundred thousand persons—were Tories, who for one reason or another neither fought for independence nor were attached to its principles. Some were officeholders under the Crown, or soldiers, or Anglican clergy; others, and the politically more interesting, were "throne and altar Tories," dedicated monarchists loyal to the king as head of the church and head of state. Most of them remained silent during the

revolutionary struggle, but many chose to become political exiles. Some returned to England, and some thirty-five to forty thousand of them went to Nova Scotia where, in 1784, they persuaded the British government to partition this "New Scotland," thereby establishing for them another colony, New Brunswick, which later became (along with Nova Scotia) one of the ten Canadian provinces. Only the departure of the Tories made it possible for Publius to say that the Americans were attached to the same principles of government.

Those principles were set down in the Declaration of Independence of 1776, when Americans declared themselves to be a "new order of the ages," the first nation in all of history to build itself on the self-evident truth that all men are created equal insofar as they are all endowed by Nature's God with the unalienable rights of life, liberty, and pursuit of happiness. The purpose of government, they then said, was to secure these rights. This was to be done—because, given their principles, it had to be done—only with the consent of the governed. With the Tories gone or silenced, there was no disagreement on this score.

But it was understood by the Framers that, while Americans were attached to the idea of rights, they would not always agree on the definition of rights, or on how rights were to be secured, or on whose rights deserved to be secured, or preferred. In fact, the Framers expected the people to have sharply differing views on these matters. Thus, the "one people" that declared its independence in 1776, and the "we, the people" that constituted a government in 1787–88 in order to "secure these rights," would, as a matter of course, be divided into factions thereafter, and, unless steps were taken to avoid it, warring factions. According to Publius (in number ten, the most frequently quoted and celebrated of the *Federalist Papers*), "The latent causes of faction are . . . sown in the nature of man," and by definition these factions have interests "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." As the Framers saw it, this was the principal problem the Constitution had to deal with.

What is more, nature, so equitable in its endowment of rights, was by no means equitable in its endowment or distribution of talents or faculties, particularly, as Publius put it, the "faculties of acquiring property." Some men are naturally more intelligent, more enterprising, or more energetic, as well as healthier, stronger, or handsomer than others. Thus, by securing the equal rights of *un*equally endowed human beings, the society would be divided

between "those who hold and those who are without property," or between the wealthy and the poor, or between the relatively wealthy and the relatively poor. Still, Publius did not hesitate to say that protecting these "different and unequal faculties"—naturally different and naturally unequal—was "the first object of government."

Accomplishment of this object was made especially difficult because those without property, or with less property, would constitute a majority, and under a republican government the majority would rule. The task facing the Framers was to design a Constitution making it less likely that this majority would misrule.

A Republican Government

There was no question but that the government would have to be republican in form. As Publius said in *Federalist* 39, "No other form would be reconcilable with the genius of the people of America; with that honorable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government." Unfortunately, while there had been republics, none could serve as a model for America. For this reason, the Framers of the Constitution had to devise a new form of republican government. As Harvey C. Mansfield Jr. explains, there are important differences between the new republicanism and the old:

> [The new] republic is based on the presumption that *the* problem of popular government comes from within the regime—from factions and tyrannical majorities. So it provides a constitution through which the people chooses to limit itself not by preventing the majority from ruling as in oligarchy, or by retaining a privileged class to rule with the majority as in "mixed government," but [rather] by constructing a majority so that it will not be factious or tyrannical. This new kind of republic is contrasted [*Federalist* 9, 10, and 14] to the old kind found in the republican tradition, which is given the pejorative label *democracy*. In democracy, the presumption is that the danger comes from outside the regime—from monarchy and oligarchy. So the popular spirit must

> be aroused and kept in a state of vigilance against its enemies; and instead of a constitution providing self-chosen limited government, the main requirement is to cultivate this vigilant spirit in republican virtue. Republican virtue, in turn, requires a homogeneous people and a small territory so that citizens can know and trust one another.[14]

Publius's description of the earlier, classical republics—he mentioned specifically the "petty republics of Greece and Italy"—was harsh indeed. They provided no barriers "against domestic faction and insurrection," he said; they were regularly overwhelmed by "tempestuous waves of sedition and party rage"; rather than serving as models for America, they were nothing so much as "the wretched nurseries of unceasing discord, and the miserable objects of universal pity or contempt."[15] Indeed, had it not been possible to devise models of a more perfect structure, "the enlightened friends to liberty would have been obliged to abandon the cause of [republicanism] as indefensible."

Fortunately, the science of politics had "devised models of a more perfect structure . . . which were either not known at all, or imperfectly known to the ancients": the regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; and the representation of the people in the legislature by deputies of their own election. These are "means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided."[16] This "more perfect structure" provided the forms that, in Tocqueville's words, "serve as a barrier between the strong and the weak," and in so doing serve as the means by which democracy is constitutionalized.

The Model of John Locke

Chief among the political scientists to whom the Framers were indebted for this new model of republicanism was John Locke. Like that of Thomas Hobbes before him, Locke's political science begins with an analysis of the nonpolitical state of nature. Whereas, according to Hobbes, the state of

nature was indistinguishable from the state of war, wherein the life of man was "solitary, poor, nasty, brutish and short," Locke speaks rather of the "inconveniences of that condition."[17] But these "inconveniences" are such that, at a certain point, war becomes inevitable. Thus, "to avoid this state of war," as Locke puts it, "is one great reason of men's putting themselves into society and quitting the state of nature."[18] They do this by entering into a compact by which every man agrees to divest himself of "his natural liberty and puts on the bonds of civil society."

Hobbes, again, required men to yield their natural rights, or liberty, to a Leviathan, but Locke finds this objectionable. Men are not so foolish, he says, to take care to avoid the mischiefs that may be done them in the state of nature by "polecats or foxes," only to be "devoured by lions," which is to say, by Leviathans, whose every act is to be considered law.[19] To prevent this, he requires men to hand over their natural rights, not to a Leviathan but, rather, to the community, with the understanding that the community be governed by laws made by a legislative body:

> The great end of men's entering into society being the enjoyment of their properties in peace and safety, and the great instrument and means of that being the laws established in that society, the first and fundamental positive law [which is to say, constitutional law] is the establishing of the legislative power.[20]

It is not by chance that article 1 of the Constitution of the United States establishes the legislative power. There is safety when the supreme power is exercised by the legislative, rather than by the Leviathan. As Locke says, the legislative rules not by "extemporary, arbitrary decrees" but by "promulgated, standing laws." In a well-ordered commonwealth,

> the legislative power is put into the hands of diverse persons who, duly assembled, have by themselves, or jointly with others, a power to make laws; which when they have done, being separated again, they are themselves subject to the laws they have made, which is a new and near tie upon them to take care that they make them for the public good.[21]

There is safety, too, in the fact that the legislature will not be in constant session, which requires that there be another power to "see to the execution of the laws."[22]

With this, Locke lays the foundation for a separation of powers, one of the features of the "more perfect structure" that Publius speaks of in *Federalist* 9. And not merely one of the features, but the central feature, because it serves both "to control the governed" and to oblige the government "to control itself."

The obligation of the government to control itself should require little demonstration; it is certainly familiar to all students of American government. As Publius says (in *Federalist* 47), "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The separation of powers, combined with the innovation the Framers learned from Montesquieu—namely, bicameralism—is one of the defining characteristics of the more perfectly structured republic.

It remains to describe how the separation of powers serves to control the governed. Traditionally, republicans were animated by a distrust of the executive, which in most cases meant the monarch. Thus, having declared their independence from George III, Americans proceeded to establish governments which, in the case of the first national constitution (the Articles of Confederation and Perpetual Union), deliberately neglected to provide for an executive or, in the case of the early state constitutions, contained provisions "for reducing the executive to a position of complete subordination [to the legislature]." The Virginia constitution of 1776 was typical in this respect:

> [The governor] shall, with the advice of a Council of State, exercise the executive powers of the government, according to the laws of this Commonwealth; and shall not, under any pretense, exercise any power or prerogative, by virtue of any law, statute or custom of England.[23]

The experience gained from this practice proved to be bitter, and the Framers of the Constitution of 1787 were determined that it not be repeated. Too frequently the laws had gone unenforced, taxes uncollected, and

the common defense neglected. With this in mind, they separated the executive and legislative powers and endowed the executive with powers derived from the Constitution itself.

Article 2 of the Constitution begins with this terse statement: "The executive Power shall be vested in a President of the United States of America." This executive was charged with the duty of executing the laws—as the Constitution puts it, "he shall take Care that the Laws be faithfully executed"—but also with responsibilities having little or nothing to do with the literal meaning of the word "execute."

It is Locke, again, who first makes the republican case for an independent executive. An executive is needed to execute the laws, and in this capacity he is subordinate to (even if not controlled by) the legislative power ("the supreme power of the commonwealth"). But Locke goes on to indicate that the well-being or, to be more precise, the safety of the commonwealth cannot be assured by laws alone.

There is, in the first place, the problem of foreign affairs, which, he suggests, cannot be directed by "antecedent, standing, positive Laws." Foreign affairs belong to the "federative power," which Locke likens to the natural power every man had in the state of nature. Since the exercise of this power—the power of "war and peace, leagues and alliances, and all the transactions with all persons and communities [outside] the commonwealth"—requires prudence, Locke puts it into the hands of the independent executive.[24]

In addition to foreign affairs, however, the good of the society may require that some domestic matters "be left in the hands of him that has the executive power." There will be "cases where the municipal law has given no direction," or where "a strict and rigid observation of the laws may do harm," or where it will be proper "to mitigate the severity of the law" by pardoning those who offend against it. Such cases require "prerogative," which Locke defines as the "power to act according to discretion for the public good, without the prescription of the law and sometimes even against it."[25]

One of the abiding questions of American constitutional law is whether "the executive power" vested in the president of the United States includes something like the prerogative as Locke defines it. Congress is inclined to deny that it does, but presidents, including the best of them, have ever claimed it.[26] And, if we accept the authority of *The Federalist*, the Framers

of the Constitution intended him to have it. The following passage from *Federalist* 28 might have been written by Locke:

> That there may happen cases in which the national government may be necessitated to resort to force cannot be denied. Our own experience has corroborated the lessons taught by the examples of other nations; that emergencies of this sort will sometimes exist in all societies, however constituted; that seditions and insurrections are, unhappily, maladies as inseparable from the body politic as tumors and eruptions from the natural body; that the idea of governing at all times by the simple force of law (which we have been told is the only admissible principle of republican government) has no place but in the reveries of those political doctors whose sagacity disdains the admonitions of experimental instruction.

As Locke says, emergencies cannot be dealt with by "antecedent, standing law"; they require the exercise of prerogative which, to repeat, he defines as the power to act according to discretion for the public good, without the prescription of the law "and sometimes even against it." Locke's prerogative, then, is an extralegal power, extralegal because it exists by necessity, not by virtue of a constitution. But, according to Publius, this power to deal with emergencies is given a place in the Constitution; it is part of the executive power vested in the president of the United States. When exercising it, therefore, the president is not acting extralegally. For, according to *Federalist* 31,

> a government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people.[27]

Among the objects committed to its care is "the preservation of the public peace" (*Federalist* 23), and, as Publius makes clear, there will be times when this can best be done, in fact can only be done, by the president exercising powers coming directly from the Constitution and "free from every other control but a regard to the public good and to the sense of the people."

Because he is not chosen by the legislature, and because he holds powers independently of the legislature, he can act without its consent. Because, unlike the numerous legislature, he is one, not many, he can act with dispatch. And because he is one, not many, it is easy to fix responsibility for what he does.[28]

To summarize: The separation of powers is a means of obliging the government to control itself; in this respect, it serves to limit government, which, in the American case, means the government of the democracy. It is also a means of controlling the governed by authorizing the president not only to enforce the law directly on the people but, if necessary—for example, in times of "domestic insurrection" (*Federalist* 26)—to employ the extraordinary powers of his office. In this respect the separation of powers serves to ensure an effective government, a government as strong as necessary. President Lincoln, who was faced with a massive insurrection, was to prove just how strong and effective this government could be.

The Role of the Judiciary

It is widely assumed, abroad as well as in the United States, that the most effective means of limiting government is the power exercised by the independent judiciary, the power of judicial review. With this power the courts, ultimately the Supreme Court of the United States, may nullify the actions of legislature and executive alike by declaring them unconstitutional. Indeed, it was with this in mind that Publius (in *Federalist* 9) speaks of the independence of the judiciary as one of the elements of the "more perfect structure" that made republican government possible. And there is no question about that independence: once appointed (by the president with the advice and consent of the Senate), federal judges serve during good behavior, which in most cases means until they die or retire. (In fact, no Supreme Court justice has left the bench in any other manner.) In the more than two centuries of its existence, the Court has declared over a thousand legislative enactments and executive actions unconstitutional.

Judicial review is thought to be especially important as a means of protecting those individual rights specified in the first ten amendments to the Constitution, popularly known as the Bill of Rights. It is sometimes said, for

example, that Americans owe their freedom of speech, press, and religion primarily to judicial enforcement of the First Amendment (which forbids Congress to make any law "respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press"). But this is only partly true, and the way in which it is not true should concern those who would rely on a judiciary for protection of their rights.

I have discussed this issue in great detail elsewhere.[29] Here it is enough to point out that it was not until 1965 (and only once or twice since) that the Court declared an act of Congress a violation of the First Amendment. The record is much the same with respect to the other provisions of the Bill of Rights. The Supreme Court has never declared a punishment imposed under federal law to be "cruel and unusual" in violation of the Eighth Amendment.

The judiciary has made a difference, however, in those cases where the states and localities have abridged rights. Literally hundreds of state statutes and local ordinances, as well as acts committed by local police, have been declared unconstitutional by the Supreme Court. That is, the courts have played their protective role as part of the federal system, or, to state the reason for their success here, when they have been opposed by local (or, at most, regional) rather than national majorities. The local authorities are inclined to obey court orders, and, on those infrequent occasions when they refuse to do so, the courts can usually depend on the president to see to it that they do. After all, the Constitution requires him to see to it that the laws are faithfully executed. (Thus, when the city of Little Rock, Arkansas, backed by the governor of the state, refused to obey a court order requiring the racial integration of a local high school, President Eisenhower sent in elements of an airborne division; and that, as the saying goes, was that.) But enforcing an order against the president or Congress of the United States, while technically no different, is another matter, and sometimes proves to be impossible. (As legend has it, President Andrew Jackson once said, "John Marshall [the chief justice at the time] has issued his order, now let him enforce it.") A few examples will serve to illustrate the point:

- In 1857, the Supreme Court declared unconstitutional an act of Congress prohibiting slavery in the northern section of a federal territory. That decision was a major cause of the Civil War, and,

the war having been won by the Union, it was reversed by a constitutional amendment in 1868.

- In 1870, the Court, by a vote of four to three, struck down a Civil War statute making non–interest-bearing notes ("greenbacks") legal tender in payment of "all debts, public and private." Having been authorized by Congress to do so, the president proceeded to appoint two additional justices and, the following year, the enlarged Court—by a vote of five to four—reversed the earlier decision.
- In 1895, the Court struck down a federal statute imposing a tax on incomes. Congress responded by proposing an amendment to the Constitution (the sixteenth) which, when ratified in 1913, gave it the power "to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."
- Following a number of decisions striking down New Deal economic or commercial legislation, President Franklin D. Roosevelt proposed that Congress enlarge the Court from nine to (potentially) as many as fifteen members. The Court, in its famous (or infamous) "switch in time that saved nine," reversed itself—indeed, not only reversed itself but, in effect, announced that it would no longer question Congress's power to regulate interstate commerce.[30]

There are, of course, cases where judgments of unconstitutionality have been accepted by the Congress. In 1990, for a recent example, the Court struck down a federal statute prohibiting the burning of the American flag. Burning the flag, the Court said, is (or in this case was) a form of symbolic expression protected by the free speech provision of the First Amendment. But this was hardly a case where the Court succeeded in imposing its judgment on an obstinate Congress. That statute was enacted, or, at least, it was supported, by its principal sponsors in the House and Senate, precisely in order to give the Court the opportunity to declare it unconstitutional. Declaring it unconstitutional was, to say the least, politically easy. When,

however, during World War II, President Roosevelt issued an executive order (subsequently ratified and confirmed by an act of Congress) empowering the secretary of war to round up thousands of Japanese-Americans and ship them off to detention centers, the Court acquiesced—not without a struggle, and not unanimously, but nevertheless, acquiesce it did.[31] The decision was greeted with dismay or disgust by many in the legal fraternity, but they ought not to have been surprised. As Publius said even in the beginning (in *Federalist* 78), "It would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community."

Fortunately, so far as the national legislature is concerned, such invasions are the exception, not the rule; in fact, they are rare—so rare that judicial action to protect rights is only rarely required—and they are rare largely because the Constitution, by devising a "more perfect" republican structure, makes it difficult for the "major voice of the community" to be expressed. As Publius says (and the emphasis is his), "*the people in their collective capacity*" are excluded from any share in the government.[32]

A Republican Constitution

The remarkable thing is that the Framers were able to persuade the people to ratify this republican Constitution. Plainly, the Framers made no effort to conceal the fact that they intended to put limits on democratic majorities; they said as much. They said that they intended the Constitution to exclude the people in their collective capacity from any share in the government; they said that the chief object of the government was to protect the diverse faculties of men, especially their "different and unequal faculties of acquiring property"; they took pride in the fact that their government was not a democracy but, rather, a republic that put some distance between the people and the levers of power:

- Their Constitution provided a president chosen not by the people but by electors who, having made their choice, would immediately disband.

- It provided a Senate chosen not by the people but by the state legislatures, each state, regardless of the size of its population, being entitled to choose two.
- It provided a House of Representatives chosen not by a majority of the whole people ("the people in their collective capacity") but by majorities within each of the districts into which each state would be divided.
- It provided a Supreme Court with the power to veto popular legislation and whose members would, in effect, serve for life.

Generally, the Constitution provided a system of divided power and checks and balances, and it was understood that what was most in need of being checked were popular majorities. Yet, these popular majorities gave it their consent.

The people were left in no doubt about the essential characteristics of the Constitution. Every aspect of it was subjected to intense scrutiny during the ratification debates. These debates, pitting Federalists (who favored ratification) against Anti-Federalists (who opposed it), were carried on in town meetings, state conventions, and in the popular press; and for every Federalist paper there was an Anti-Federalist paper, for every Publius a Cato, for every Cassius a Brutus or Agrippa or Centinel or Hampden. The Anti-Federalists complained of the six-year terms for senators, of the reeligibility of the president, of the provision for a standing army (which they saw as a weapon to be used against the people), and, generally, of what they called the "aristocratic tendency of the Constitution." Patrick Henry, for example, who led the opposition in Virginia, said the Constitution "has an awful squinting; it squints towards monarchy."[33] Yet Virginia, like every other state, voted narrowly in favor of ratification. Under the circumstances this was truly remarkable.

Publius recognized this, and argued strenuously against Jefferson's suggestion that, in effect, the ratification process be repeated from time to time.[34] What Publius believed to be true then—namely, that given another chance, the people would be likely to reject the Constitution because of the restrictions it imposed on popular majorities—would almost surely be true today. This judgment is strengthened by the changes that have been made since the Constitution was first adopted. Senators are now chosen by popular vote of

the people in the states,[35] and the right to vote, in state as well as federal elections, has been extended not only to blacks and women, but to persons "eighteen years of age or older," and cannot be denied to persons by reason of their "failure to pay any poll tax or other tax."[36] Then, too, the early appearance of political parties had the effect of taking the choice of the president from the nominally independent electors and putting it in the hands of the people; and the day will surely come when the electoral college itself will be abolished and replaced by a system of direct popular election.[37] (This did not happen in 2000, however, even though the presidential candidate who won a majority of the popular votes, Al Gore, failed to win an electoral college majority.)

A Model Constitution

These changes in the direction of more democracy may satisfy the people, at least for the time being. They clearly do not satisfy many political scientists who, because of the positions they occupy, are capable of exerting an influence out of proportion to their numbers. The more radical among them (mostly Marxists) teach their students—and, thanks to a policy of open admissions and generous government subsidies, something approaching fifty percent of the people are, or have been, students—that the Constitution is an "elitist document" providing "democracy for the few."[38] Others, including a handful of the most illustrious, complain that, while not necessarily elitist, it still fails to provide government sufficiently (by which they mean immediately) responsive to the wishes of the people.

Of course, it was not intended to do this. By providing for the representation of the great variety of interests within the "extensive territory" of the United States, the Constitution was intended to prevent the formation of a majority with a common interest "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[39] In the United States, governing majorities are assembled not from among the people directly (not even when they are organized in or by political parties) but from among the representatives of the people. Because they represent different interests, and because the legislative branch is separated from the executive, and because the legislative branch is itself divided into House and Senate, assembling this majority is not a simple matter.

The political scientists find this exasperating; they write books complaining of the deadlock of democracy and propose to end that deadlock by instituting something like the British system. In a word, they want party government, in which party serves as the means by which majority opinion is readily translated into public policy.[40] For them, popular government means giving the people what they want (or what they say they want) as soon as they want it, which means a government unable to do anything unpopular.

Woodrow Wilson, a president of the American Political Science Association (APSA) as well as of the United States, was one of the earliest proponents of party government in the United States. Writing in 1885, he complained that the Congress was too strong and the executive too weak, and the consequence of this was irresponsible government. How, he asked, can we identify whom to praise and whom to blame for what is done under this system? Indeed, who can be said to govern when power is divided between the executive and the Congress, and, within the Congress, dispersed among the various standing committees?

The cure for this was government by majority party. "The British system is perfected party government," Wilson wrote, and among the features that make it perfect is that no effort is made in the House of Commons "to give the minority a share in law-making."[41] Nowhere does he express any concern that a majority so organized and led might fit Publius's description of a faction.[42] Whereas the Constitution was intended to make democracy safe for the United States, Wilson's policy, which he embodied in a demagogic slogan, was to make the world safe for democracy. (Historians can decide whether, or to what extent, the world he helped to create provided the degree of safety he envisioned.)

Wilson's complaint and prescription were echoed in 1950 by an official committee of APSA, and in 1963 by James MacGregor Burns, another president of the association.[43] Indeed, there seems to be something about political scientists that leads them to favor efficient majority-rule government and to be oblivious to the forms (in Tocqueville's sense) that make it safe.

Writing from the Marxist perspective, still another president of APSA saw the Constitution as the product of a conspiracy among the holders of public securities, or of personal as opposed to real property.[44] Other scholars have demonstrated that he was wrong about the conspiracy,[45] but there is no denying that the Framers intended to lay the foundation for a commercial society:

> By multiplying the means of gratification, by promoting the introduction and circulation of the precious metals, those darling objects of human avarice and enterprise, it serves to vivify and invigorate all the channels of industry and to make them flow with greater activity and copiousness.[46]

And there is no denying Madison's assertion that the protection of the diverse faculties of men, especially the "different and unequal faculties of acquiring property," was the "first object of government."[47]

Yet what is this but the principle underlying the free market? And is not the free market the cause of the country's material prosperity? And is not that prosperity widely shared? And is this not—as it was intended to be—one of the means of mitigating democratic envy and, therefore, of solving the problem of democracy? Those who complain of the free market are not, even now, the people. (What Tocqueville said 160 years ago remains true today: "As everyone has property of his own to defend, everyone recognizes the principle upon which he holds it.")[48] They are, instead, those who, without warrant and holding no public office, claim to speak in the name of the people: the Marxists and a handful of political scientists, to say nothing of those who have gone to school with Friedrich Nietzsche, Martin Heidegger, and their postmodernist epigoni.[49]

These dissenters were not on the scene in 1787–88, and their absence must be counted among those circumstances that favored the adoption of the Constitution. Without them, the Framers were able to persuade the people to ratify a constitution that establishes a government of the people and for the people, but not immediately by the people. As Publius says, it is a government that derives all its powers directly or indirectly from the great body of the people and is administered by persons holding their offices during pleasure, or during good behavior, but from which "the people in their collective capacity" are excluded.[50] By any fair reckoning, however, the people have not been excluded from its benefits.

6

Constitutionalism and Multiculturalism

> *Hath not a Jew eyes? hath not a Jew hands, organs, dementions, sences, affections, passions, fed with the same foode, hurt with the same weapons, subject to the same diseases, healed by the same meanes, warmed and cooled by the same Winter and Sommer as a Christian is; if you pricke us doe we not bleede? if you tickle us, doe we not laugh? if you poison us doe we not die? and if you wrong us shall we not revenge? if we are like you in the rest, we will resemble you in that.*
>
> —Shakespeare, *The Merchant of Venice*, act 3, scene 1

Alexis de Tocqueville, writing in the 1830s, very much feared that liberty and equality would be at war with each other; today there is a tendency among some intellectuals to think that peace between them can be achieved by combining them under the label "cultural pluralism." Cultural pluralism implies equality, we are told, and equality implies freedom for the various elements (mainly religious opinions and ethnic groups) being combined. It also implies—indeed, it is said to require—a "nonideological state," or an ideologically neutral state; and it is only a short step from this to say that such a state is obliged to promote "multiculturalism" by making it a part—in fact, the organizing principle—of the public school curriculum, for example. In such a curriculum all "cultures" are to be treated as equal, or as equally deserving of respect. But there is a question as to whether multiculturalism is compatible with the principles of the Constitution and, therefore, capable of providing a foundation for what is said to be the cultural pluralism we have long enjoyed in this country. Whether it is compatible depends on what is meant by culture.

Although not the first to use the term in its modern sense, Thomas Carlyle (in the 1860s) spoke of culture as the body of arts and learning separate from the "work" of society. This definition has the merit of reflecting (and that very clearly) the problem that gave rise to the idea of culture and the attempt to define it in the early nineteenth century. Carlyle was preceded by Coleridge, Keats, Shelley, and Wordsworth, who, in his role as poet, saw himself as an "upholder of culture" in a world that disdained it, and by John Stuart Mill, for whom culture meant the qualities and faculties that characterize our humanity, or those aspects of humanity that he foresaw would be missing in a utilitarian society. He was followed by Matthew Arnold, for whom culture meant not only literary pursuits but—in a sentence that became familiar if not famous—the pursuit of "the best which has been thought and said in the world."[1]

What these critics had in common was a concern for the sublime (or the aesthetic), and a complaint against the modern democratic and commercial society in which it had no firm place. The founders of this modern society—say, John Locke and Adam Smith—promised to provide for the needs of the body (and in this they surely succeeded); culture was intended to provide for the needs of the soul—Coleridge, for example, made this the business of his "clerisy." As Allan Bloom put it, "Only when the true ends of society have nothing to do with the sublime does 'culture' become necessary as a veneer to cover the void."[2]

The proponents of multiculturalism have something different in mind when they speak of culture. Introducing Charles Taylor's essay on the subject, political scientist Amy Gutmann says that public institutions, "including government agencies, schools, and liberal arts colleges and universities, have come under severe criticism these days for failing to recognize or respect the particular cultural identities of citizens." She mentions specifically African-Americans, Asian-Americans, Native Americans, and women.[3] Culture here seems to mean not Matthew Arnold's formulation of it, which, as such, might serve (as Shakespeare's plays and poems have served) to civilize and, in some way, even to unify peoples; rather, culture here seems to mean the different customs, ways, mores, or morals/manners—*moeurs,* as Tocqueville called them—of peoples, groups, and (if we are to believe Amy Gutmann) even the sexes. Thus, in the body of his essay, Taylor refers specifically to the French Canadians, whose *moeurs* are not those of the English Canadians, and for

which the former demand recognition—demand it and apparently deserve it, not because their culture is superior in Matthew Arnold's sense to that of the English Canadians, but simply because it is theirs.

No country has done more to recognize the diversity of morals/manners than Canada; it even has a (federal) Department of Multiculturalism and Citizenship and provides generous subsidies for "ethnic" music, painting, dance, drama, and museums. Initiated in the 1970s by Prime Minister Pierre Elliott Trudeau, its purpose was "to add to the cultural richness of Canadian life by assisting the smaller ethnic groups [that is, groups other than the English and French Canadians] to maintain certain of their traditional cultural forms and a distinct sense of identity, if such was their desire."[4] These diverse groups were to form the Canadian "mosaic." But it is one thing to provide subsidies for folk dancing groups and ethnic cooking and quite another to allow these groups, without exception, to retain their "cultural identities." The feasibility of the latter program would surely depend on what it is in their culture that they want to retain. After all, to the extent that the Canadians allow some groups to retain their cultural identities, they will inherit some nasty ethnic rivalries.

Nevertheless, Canadians speak of multiculturalism as a form of Canadian nationalism "that will convert ethnic rivalries from one of the problems or weaknesses of a society into one of its strengths."[5] But success here will depend, to some extent at least, on a strengthening of national identity and a corresponding weakening of ethnic identity, a subject I'll have more to say about in due course. But how does a government intend to go about converting its Serbs and Croats, for example, into Canadians? Not, surely, by policies designed to refurbish and strengthen their memories or otherwise preserve their traditions. Better that they forget their history lest they be led to repeat it in Canada.[6] And they can be led to forget it only by being taught that Canada is something more than the sum of its diverse parts and something better than any of its parts. This, of course, is what the United States set out to do in 1787, except that its "parts" were understood to be individuals with rights, not groups making up a "mosaic."

The Framers of our Constitution never spoke of multiculturalism, cultural pluralism, or, for that matter, even of pluralism. Such terms were not part of their political vocabulary.[7] Nor were they sanguine about the possibility of combining cultures. Instead, as the following passage from

Federalist 2 indicates, they were sanguine about our prospects only because we were (or were said to be) united in all essential respects:

> Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established their general liberty and independence.

The same concern for unity, or a similarity of manners, customs, and, above all, opinion concerning the principles of government, is reflected in the early statements and congressional debates having to do with immigration and naturalization. These debates took place in 1790 and 1794, and everyone who addressed the issue favored population growth and, to that end, a liberal immigration policy; but, at the same time, everyone recognized the importance of excluding the immigrant who, in Madison's words, could not readily "incorporate himself into our society," or, as Theodore Sedgwick put it, would not "mingle [here] in social affection with each other, or with us," or, finally, "would not be attached to the principles of the government of the United States."[8]

As Jefferson said, "Every species of government has its specific principles [and] ours perhaps are more peculiar than those of any other in the universe." He, of course, knew nothing of those who would be of concern to later generations of politicians, the fascists and communists. He was concerned with monarchists and even the immigrants who had been ruled by monarchs. He was afraid that they would bring with them "the principles of the governments they leave, imbibed in their early youth; or, if able to throw them off, it [would] be in exchange for an unbounded licentiousness, passing, as is usual, from one extreme to another." Those principles, he continued, they might transmit to their children. "In proportion to their numbers, they will share with us the legislation [and] will infuse into it their spirit, warp and bias its direction, and render it a heterogeneous, incoherent, distracted mass."[9]

Thus, rather than seeing advantages of diversity, the Framers wanted immigrants to be assimilated, incorporated into "our society," with a view to maintaining a population whose members would be attached to the same principles of government. (As Jefferson put it, a "homogeneous" society would be "more peaceful [and] more durable.")[10] They had no idea of accommodating a variety of disparate "cultures." From the available evidence, it appears they would have thought that impossible.

What we see as cultural differences, they saw as religious differences. Indeed, they probably would have agreed with one of his critics that Horace Kallen (who was the first to use the term cultural pluralism) did not take culture seriously precisely because he did not appreciate its religious foundations:

> If we think of culture not superficially in terms of graphic arts, music or literature, but as the firm cradle of custom in which the baby is laid and which inevitably forms his emotional life, his food habits, his language, his thoughts, his skills, his sexual life, his work, and his moral values, the envisioned fluid "cultural mobility" becomes rather incredible. One cannot be brought up in all languages, all family patterns, all religions.[11]

Since our constitutional principles are most evident in those provisions dealing with religion, for our purposes here, cultural pluralism, at least initially, will mean religious pluralism. What, besides language (and political memories), distinguishes the French from the English Canadians save religion? Is it possible that the culture in multiculturalism—especially when it is taken seriously—means religion, or at least has its ultimate source in religion? After all, as Shakespeare's Shylock indicates (see the epigraph above), we are *one* with respect to the body and its passions, but *many* only with respect to our memories and our manners/morals, whose source is in our political and religious (or irreligious) beliefs. Understanding the conditions of our religious pluralism will shed some light on the possibility—or better, the impossibility—of multiculturalism.

In 1776, we declared ourselves a "new order of the ages," the first nation in all of history to build itself on the self-evident truth that all men are created equal insofar as they are equally endowed by nature's God with the unalienable rights to life, liberty, and the pursuit of happiness. The purpose

of government, we then said, was "to secure these rights." This was to be done—because, given our principles, it had to be done—only with the consent of the governed.

But it was understood by the Framers of the Constitution that the governed would not always agree on the definition of rights, nor on how rights were to be secured, nor on whose rights deserved to be secured or, in the event of a conflict, preferred; in fact, the Framers expected the people to have sharply differing views on these matters. Thus, the "one people" that declared its independence in 1776 and the "we, the people" that constituted a government in 1787–88 in order to secure those rights, would, as a matter of course, be divided into factions thereafter, and, unless steps were taken to avoid it, warring factions. According to James Madison (writing in number 10, the most frequently quoted and celebrated of the *Federalist Papers*), "The latent causes of faction are . . . sown in the nature of man," and by definition these factions have interests "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."

Given these conditions, the securing of equal rights would not be an easy matter; it would be especially difficult because nature, so equitable in its endowment of rights, was by no means equitable in its endowment or distribution of talents or faculties, particularly, as Madison put it, the "faculties of acquiring property." Still, he did not hesitate to say that protecting these "different and unequal faculties"—naturally different and naturally unequal—was "the first object of government." The consequence of securing the equal rights of unequally endowed human beings would be a society divided between "those who hold and those who are without property." It followed for him that the regulation of these property factions—creditors, debtors, and landed, manufacturing, mercantile, moneyed, and "many lesser interests"—would be the "principal task of modern legislation." Unlike the others—such as religious factions—these property factions could be regulated (and accommodated) because, although divided one from another, they shared a common interest in economic growth, and to promote this growth would be the task of modern legislation. America's business would be (as Calvin Coolidge many years later said it was) business.

Madison proved to be a poor prophet with respect to the "business" that occupied the country during the first half of the nineteenth century. From 1819, when Congress began to debate the Missouri question, through the

years of the Mexican War (and the Wilmot Provision it provoked), the compromise of 1850, the Kansas-Nebraska Act of 1854 (and the "Bloody Kansas" it provoked), the *Dred Scott* decision of 1857, the Civil War and Reconstruction, Congress, and indeed the entire country, was principally concerned with an issue that Madison neglected to mention in *Federalist* 10: namely, the slavery issue and the factions it aroused.

To judge from what he wrote in *Federalist* 56, Madison expected (or hoped) that time would resolve this issue. "At present," he wrote, some of the states, and especially the southern states, were "little more than societies of husbandmen. Few of them," he went on, "have made much progress in those branches of industry which give a variety and complexity to the affairs of a nation." But he expected this would change in time; with time would come a diversification of the state economies, which, if true, would relieve the southern states of their dependence on slave labor, with the result that slavery would cease to be, or would not become, an issue in national politics. In fact, of course, it became *the* issue in national politics, and the Madisonian system proved incapable of resolving it. Had he foreseen this, Madison might have said in 1788 what Abraham Lincoln said in 1858, namely, that "a house divided against itself cannot stand," which, until proven otherwise, can stand as our definitive statement on the possibility of multiculturalism.

The question then arises as to why Madison was so confident that the other sorts of factions he identified, particularly religious factions, would not require legislative "regulation." Or, to speak more plainly, why did he think this modern "civilized" nation would be able to avoid the religious problem? That had not been true in the past, especially in the Britain whose history he knew so well, and it is not true everywhere now. In the Britain he knew, religion had given rise not only to factions but to civil war and revolution. Why was he confident that this would not be the case in America?

The answer is that the Constitution took religion out of politics, thereby making legislative regulation unnecessary. By separating church and state—specifically, by guaranteeing the free exercise of every religion while favoring none—the Constitution guarantees a proliferation of religious sects, a plurality or "multiplicity of sects," as Madison puts it in *Federalist* 51, none of them capable of constituting a legislative majority. The various sects will have to live with each other; more to the point, as merely one among many, each sect will be required to forgo any attempt to impose its views on the others. The

government itself will be neutral in religious matters, and this makes it possible to say that almost anybody, of any religious persuasion—or, at least, nominally of any religious persuasion—can become an American. All we require is a pledge of allegiance "to the flag of the United States" and "to the republic for which it stands," implying (especially nowadays) that anybody can make the promise, and that no one will have difficulty keeping it.

In saying this, however, we tend to forget the restrictions we used to impose—on Chinese immigration, for example—or the limits we in fact used to enforce. Until recently, that pledge of allegiance was understood to imply a renunciation even of certain political opinions—for example, the advocacy of the overthrow of government by force or violence. It was only in 1974 that the Supreme Court held that members of the Communist Party could not be kept off the ballot for refusing to take an oath renouncing such advocacy.[12] Nor was our record much different with respect to religious opinion, and this despite the First Amendment. For example, our toleration did not extend so far as to embrace the Mormons and their practice of plural marriages. "To call [the advocacy of bigamy and polygamy] a tenet of religion is to offend the common sense of mankind," the Supreme Court said in 1890.[13] When, a few years earlier, Abraham Lincoln was asked what he would do about the Mormons, he replied that he proposed "to let them alone"; but his Democratic adversary, Senator Stephen A. Douglas, campaigned to keep them out—by keeping Utah out—of our union.

But all this is history, a history that many of us would prefer to forget; today no one has reason to be concerned about the Communists, and no one publicly advocates polygamy (to say nothing of slavery). It is, of course, true that the Constitution is not *altogether* neutral respecting religion. It counts the years in a Christian manner (see article 7), and it recognizes, at least for one purpose, Sunday as the Sabbath (see article 1, section 7); but the non-Christians have learned to live with this. Speaking for a Supreme Court majority, Justice George Sutherland once said, "We are a Christian people," but that was in 1931, and no one—at least, no one in an official capacity—would say that today.[14] Instead, we are inclined to speak of "our Judeo-Christian tradition"; and if there were to be, as there has been in Britain, a great increase in the number of Muslims among us, I have no doubt that our multiculturalists would happily adapt this to read "our Judeo-Islamic-Christian tradition."

The situation in Britain is worth describing because, while interesting in itself, it also serves to remind us of the persistence of the religious issue and the difficulties facing a multicultural society. Britain has a religious problem today, and not simply because, unlike us, they do not separate church and state. By law, the Church of England remains the established church: its archbishop of Canterbury retains his precedence, even over the prime minister, and only its doctrines are protected by the law of blasphemy. Despite this, the British might claim to be a pluralist society, in practice if not in principle. They began in 1689 by tolerating most Protestants, including the Quakers, and over the course of the years—which, in the event, proved to be centuries—extended this privilege to Roman Catholics, Jews, and every variety of Protestant. In theory, there remains, as there was in 1689, a majority church, but only 2.3 percent of the population now attend its services on any given Sunday. The Queen, an Anglican in England and a Presbyterian in Scotland, might attend "chapel" services in Wales, a Roman Catholic Mass in Liverpool, or Jewish services in a synagogue without arousing public comment.

Under the 1944 Education Act, religious minorities in Britain were permitted to invoke the "conscience clause" in order to exclude their children from participating in certain acts of worship or religious instruction programs in the state schools; more than that, Roman Catholics and Jews were entitled to public funding for their own denominational schools. For all these reasons, Britain might have thought that it had become, in the words of the Anglican *Book of Common Prayer*, a haven for "all sorts and conditions of men." Instead, as I said, it finds itself with a religious or cultural problem. And, faced with a similar situation, so might we.

The problem arose from the fact that there are now one and a half million Muslims in England alone, a total exceeding the number of Roman Catholics and Jews combined; and Muslims especially do not believe, because they cannot believe, in the separation of church and state. Bernard Lewis explained why this is so. "Muhammed," he said, "was not only a prophet and a teacher, like the founders of other religions; he was also the head of a polity and of a community, a ruler and a soldier."[15] It was this (and "a thousand other reasons") that led Tocqueville to say that Islam and democracy could not readily coexist.[16] The Salman Rushdie affair made the British very much aware of this; they learned, as we

might come to learn, that Muslims do not believe in freedom of speech, for example.

Freedom of speech is not the only problem for Muslims (to the extent they remain committed Muslims). The other is secularism, and Britain, having embarked on the path of toleration in 1689, has reached the point where it has become a secular society. In response to complaints made by various minority groups—not, we are told, only the Muslims—the British government decided to "celebrate diversity" by instituting a program of multicultural religious instruction in the state schools. Under the new program, all religions were, nominally at least, to be "taught"; in fact, however, each was to be taught as a "possible system of meaning and value," or, in the words of the Swann Report recommending the program, taught insofar as its doctrines were not in conflict with "rationally shared values."[17]

Reasonably enough, the Muslims objected to the program (as well as to other elements of the curriculum: anthropomorphic art, sensual music, "progressive" sex education, and the Darwinian theory of evolution). They continue to cling to their "cultural identity" by taking their religion seriously, unlike the British majority. Because they do, they prefer the old system, under which the state schools taught Christian doctrine (or a watered-down version of Christian doctrine) but allowed them to remove their children from the program by invoking the "conscience clause" on their behalf. As they see it, better a "benign uniformity," as one commentator put it, than a "compulsory 'diversity.'" At least under the old system, they were not compelled to subscribe to opinions contrary to their articles of religion.

As one writer suggested, the problem might be resolved by providing public funding of denominational schools without exception:

> British Muslims, and for that matter British Hindus, Sikhs, and even its conservative Protestants, continue to be denied the denominational status that their numbers and popularity demand. They resent this. They point out, correctly enough, that they pay taxes like everyone else, and should accordingly be granted the same privilege as any other religious minority. They conclude, reasonably enough, that they are denied those privileges because the central authorities fear that, if granted them,

> they might actually use them for something other than the pursuit of "rationally-shared values."[18]

Rather than accommodating its Muslims, Hindus, and Sikhs by providing public funding of denominational schools without exception, the British majority insists on imposing its policy of not taking religion seriously on minorities that do take it seriously. As a result, Britain has a serious cultural problem.

Unlike the British, we confine religion to the private sphere, and there is much to be said for that policy. Moreover, we protect it there. Thus, in 1925, the Supreme Court held that no state may compel students to attend public, rather than private or parochial, schools.[19] As Jefferson once said, "Our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry."[20] Still, contrary to Madison's expectations, the religious problem abides. Try as we might, there are certain to be times in the life of a nation, even a nation devoted to business and its regulation, when men's religious opinions will carry more political weight than their opinions in physics or geometry—or, as the abortion issue should remind us, than their opinions in genetics, ontology, sociology, or whatever. Of course, Madison would have said that abortion did not belong on the national political agenda, and that it was only because of the Supreme Court's improper intervention that it was put there. On the whole, however, our policy of separating church and state has served us well, which is why it is important to understand what it requires of us.

Separation of society and state; separation of the private and the public; separation of church and state; these distinctions are major stones in the foundation on which American constitutionalism is built, and all of them rest on the constitutional distinction between soul and body. If not the first to make these distinctions, John Locke was the first to persuade Americans of their necessity in politics, and, in his (Virginia) Bill for Religious Freedom, Jefferson was the first to propose that the last of them be embodied in legislation. He had made a careful study of Locke's "Letter Concerning Toleration" and, in so many words, repeated Locke's statements concerning the care of body and soul respectively. According to Locke, the commonwealth is "a society of men constituted only for the procuring, preserving, and advancing . . . [of] life, liberty, health, and indolency of body; and the

possession of outward things, such as money, lands, houses, furniture, and the like"; whereas the care "of each man's soul belongs to himself."[21] Or, in Jefferson's words, "The operations of the mind, [as opposed to] the acts of the body, are [not] subject to the coercion of the laws."[22] Accordingly, the Framers of the Constitution separated church and state, thereby making religion a wholly private matter.

Keeping it private is another matter. As I have pointed out in another place, because the biblical religions especially—Judaism, Christianity, and Islam alike—teach that souls belong to God and that, whether through the agency of Moses, Jesus, or the Archangel Gabriel (or Jibral), God has revealed His will or His law respecting the care of souls, there is always the possibility (if not a clear and present danger) that someone not attached to our constitutional principles will claim to know God's will and try to enforce it on his neighbors.[23] Indeed, as we are reminded almost daily by events in Iran and Iraq, there are people who, when given the chance, will do just that. Such people prefer to fight religious wars rather than accept cultural pluralism; as such, they cannot be "attached to the principles of the government of the United States," and, to recall Madison's words, they cannot readily be incorporated "into our society."

We cannot tolerate *them* (at least, not in any numbers) because *they* are not tolerant; more precisely, we must insist that they disclaim the authority on the basis of which one might *be* intolerant. This means that, in their capacity as citizens, they must recognize the right of liberty of conscience. For example, just as the Constitution expects us to forget that we are no longer English (Irish, German, or whatever), it expects Episcopalians, for instance, to forget the eighteenth of their thirty-nine Articles of Religion, which reads: "They also are to be [held] accursed that presume to say, that every man shall be saved by the Law or Sect which he professeth, [so long as] he be diligent to frame his life according to that Law, and the light of Nature." In their capacity as citizens, however, Episcopalians are required to be guided by that light of nature. They are expected to follow the example of a Reverend Mr. Shute in the Massachusetts Ratifying Convention of January 30, 1788, who said,

> Far from limiting my charity and confidence to men of my own denomination in religion, I suppose, sir, that there are worthy

> characters among men of every denomination—among the Quakers, the Baptists, the Church of England; and even among those who have no other guide, in the way to virtue and heaven, than the dictates of natural religion.[24]

In the light of nature (and according to the Constitution), nobody is "accursed." On the contrary, everybody is endowed with the unalienable right to pursue happiness as he (and not his neighbor or the government) defines it. As Locke put it, liberty of conscience is "every man's natural right," a principle echoed by Jefferson in the (Virginia) Bill for Religious Freedom, where we read that "the rights [of conscience] hereby asserted are of the natural rights of mankind." That principle is embodied in the Constitution—in fact, our constitutionalism rests on it—and we are all expected to acknowledge it when we act politically. The Constitution speaks not of Christian, Jew, or Muslim, but consistently only of undifferentiated "persons" (and, in one place, of "Indians, not taxed"). By so speaking, it seeks to discourage religious (and antireligious) parties in favor of secular political parties. It expects us—whatever our religion, and whatever our cultural "identity"—to be able to come together in those parties. But it is not easy to form a governing political majority with those whom, by their failure to subscribe to our particular articles of religion, we hold to be "accursed."

Thus, contrary to the multiculturalists, the Constitution is not ideologically neutral. If it were, all political issues would be properly resolved, one way or the other, by popular vote of the people or their elected representatives. Among these issues is, or was, the one that engaged Senator Stephen A. Douglas and Abraham Lincoln in the 1850s: the issue of slavery in the territories. Douglas called his slavery policy "popular sovereignty" and, thus dignified, made it the principle of his Kansas-Nebraska Act. But Lincoln insisted that the Act was un-American precisely because it took no stand—which is to say, because it was neutral—on the question of whether slavery was good or bad. The Act's moral neutrality contradicted the self-evident truth that all men are created equal.

So, too, with respect to religious issues. Of course, the Constitution is neutral with respect to religion, neutral insofar as it forbids any government policy favoring one religion over another; but this means that religious issues, like that of slavery in the territories, are not properly resolved by

popular vote of the people or their elected representatives. Were it otherwise, no constitutional principle would stand in the way of a self-styled "moral majority" determined to impose its ways on those it regards as immoral minorities. Our religious pluralism depends not on ideological neutrality but on the continued vitality of the principles we held to be self-evident in 1776 and embodied in the Constitution in 1787–88, and prominent among these truths is that the care of each man's soul belongs to himself alone. Not every "culture" recognizes these truths; those that do not cannot be regarded as equal to ours. Which is to say, in the light of the Constitution, all men are created equal, but not all "cultures."

As Amy Gutmann points out (as if it needed pointing out), we encounter problems with multiculturalism "once we look into the *content* of the various valued cultures." She wonders whether we can afford to respect, or "recognize," illiberal cultures or, as she puts it, "those cultures whose attitudes of ethnic or racial superiority . . . are antagonistic to other cultures."[25] She would surely agree that we cannot allow the successors to the Ayatollah Khomeini to send their agents among us to assassinate our "blasphemous" Salman Rushdies. Unlike Iranian law, under our Constitution there is no such thing as blasphemous speech. If, nevertheless, such assassins do appear among us and commence their vocation, and we apprehend them, are they entitled to be tried by a jury prepared to help a group preserve its cultural identity? There are those who say so.

The Sixth Amendment to the Constitution provides that in "all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." In recent years black Americans, whether on trial themselves or as the victims of alleged crimes committed by others, have insisted that juries cannot be impartial unless they are representative. In response, several state legislatures, including Florida's, proposed laws guaranteeing racially balanced juries. This may be in violation of the Sixth Amendment, which, the Supreme Court said recently, requires "impartial" juries, but does not require, and may even forbid, "representative" juries.[26]

This jury issue is not new; in fact, it is at least nine hundred years old. In 1255, King Henry III ordered the arrest of some ninety-two Jews on charges of ritual murder. On being indicted and sent to London for trial, eighteen of them, "regarding conviction as a foregone conclusion unless they were allowed

a mixed jury, refused to put themselves upon the country." This was construed as a confession of guilt, and the eighteen were summarily executed.

The privilege of being tried by a mixed jury—or, in the official language of the time, by a panel *de medietate*, which, in this case, meant half Jewish, half Christian—was sometimes denied, and, upon Edward I's accession to the throne in 1272, was revoked for a time; but when honored, it served as some protection for this particular "cultural" community. That protection came to an end on—and surely not by chance—All Saints Day, November 1, 1290, when Edward "issued a decree consigning the Jewry of England to perpetual banishment."[27] And with the banishment ended this early experiment in multiculturalism.

Then there is the more recent British practice, the one adopted to deal with the multicultural situation in Northern Ireland. (To paraphrase W.S. Gilbert, Northern Ireland is the very model of a modern multiculturalism.) The current problem is a variation of the one the British faced earlier when they governed the whole of Ireland. Not surprisingly, at that time, trial by jury did not function in Ireland as it did in England. Too often, Irish juries simply refused to convict the guilty; even so, we are told, "that most hallowed right of English law, trial by common jury, was preserved even in Ireland" for most of the nineteenth century.[28] Not so in Northern Ireland today. Faced with unacceptable differences in the way Protestant and Catholic defendants were treated, the British Parliament, in 1973, abolished trial by jury for defendants accused of violent crimes.[29] So much, then, for that "most hallowed right of English law, trial by common jury."

Banishment is one way to deal with a multicultural problem, and abolishing trial by jury is another, but neither is permitted to any government of the United States; our Constitution based on the rights of man forbids it. Do we, then, adopt different rules of justice for our different groups? Amy Gutmann says that "recognizing and treating members of some groups as equals now seems to require public institutions to acknowledge rather than ignore cultural peculiarities, at least for those people whose self-understanding depends on the vitality of their culture."[30] But instead of recognizing their "cultural peculiarities," especially their peculiar or different rules of justice, do we not owe it to ourselves to persuade them of the superiority of ours: trial by impartial jury and the other elements making up due process of law; government by the consent of the governed;

freedom of speech, press, and conscience—in other words, government designed to secure the unalienable rights not of groups or "cultures," but of man? Indeed, does not our system of constitutional government itself presuppose *one* people, in the words of *Federalist* 2, a people "attached to the same principles of government"? To pose the jury question bluntly, does not the criminal justice system presuppose that African-, Hispanic-, Asian-, and Jewish-American defendants can receive a fair trial by "impartial" juries and judges? And that it will be a sorry day for this country if they cannot?

The jury problem pales almost to insignificance when weighed with the problem facing many liberal democracies today, especially those of Western Europe, that of accommodating refugees from the east and south. The problem is new, but its seeds were sown in religious conflicts five hundred and more years ago. In 1993, political scientist Samuel P. Huntington wrote that "the most significant dividing line in Europe may well be the eastern boundary of Western Christianity in the year 1500":

> The peoples to the north and west of this line are Protestant or Catholic; they shared the common experiences of European history; they are generally economically better off than the peoples to the east . . . The peoples to the east and south of this line are Orthodox or Muslim; they historically belonged to the Ottoman or tsarist empires; they were only lightly touched by the events shaping the rest of Europe. …Conflict along the fault line between Western and Islamic civilizations has been going on for 1,300 years.[31]

The movement of peoples today—sometimes almost entire populations—illustrates not only the enduring strength of these religious and ethnic hatreds but the extent of the problem facing liberal regimes today. It is sufficient to mention Germany, where the influx of refugees from Eastern Europe has given rise to a resurgence of nationalist sentiments of the nastiest kind; or Italy, which turned back entire shiploads of people fleeing Albania; or France and its treatment of Muslims, most of them North Africans.

In this situation, it is easy to sympathize with Prime Minister Trudeau's multicultural policy; generous, tolerant, and seemingly liberal, it was sup-

posed to provide an example to a world sorely in need of what it had to offer. It was to make Canada "a special place, and a stronger place," stronger than the United States, a multicultural "mosaic" rather than a "melting pot," "a brilliant prototype for the moulding of tomorrow's civilization."[32]

At Trudeau's urging, Canada officially became a bilingual country. In order to become the master of its own fate, it arranged to have the British North American Act of 1867 converted into the Canadian constitution, or, in the word at the time, it "patriated" its constitution from Britain. To guarantee the rights of all its people, in whatever province they might reside, in 1982 it attached to that "patriated" constitution a Charter of Rights and Freedoms. Since then the country has been engaged in what might be described as a perpetual and itinerant constitutional debate, moving from Ottawa, to Meech Lake, to Charlottetown, with frequent stops in all the provincial capitals, most frequently and persistently Quebec. At issue was (and is) Canadian unity.

The first Ottawa round—commentators adopted the parlance of prize-fighting to describe the debate—ended when Trudeau's nation-building effort, with its emphasis on the equal rights of Canadian citizens at the expense of the powers of the provinces, went down to defeat at the hands of the Quebecois. In round two, the western provinces, reacting to Trudeau's language and energy policies, began to demand a restructuring of the senate in order to check the power of populous Ontario and Quebec. This was followed by the election of a separatist government, under René Lévesque, in Quebec.

Round three began in 1980 with Trudeau's effort to bypass the provincial governments by appealing to the people directly, but, failing in this, he was forced to make the concessions demanded by the provincial governments in order to get the constitution "patriated"; even so, Quebec refused to go along. Round four engaged the aboriginal peoples, who, dissatisfied with a constitutional provision guaranteeing their "existing rights," renewed their demand for self-government; at the same time, Ottawa (now represented by Brian Mulroney) and Quebec (now represented by Robert Bourassa) began a series of negotiations with the various provincial premiers leading to the Meech Lake Accord of April 30, 1987. Under this agreement, all the provinces would gain the powers demanded by Quebec, although Quebec was to be recognized as a "distinct society." Under its

terms, the accord had to be ratified by the federal parliament and all ten provincial legislatures. This requirement proved to be its undoing because, by involving the legislatures it involved the people, if only indirectly, and, as the public opinion polls indicated, a majority of the people were strongly opposed to it. Round five came to an end in October 1992, when a majority of Canadians, in a majority of the provinces, rejected the Charlottetown Accord in a national referendum. It was rejected largely because, in order to win equal representation in the Senate, the polygenetic western provinces had to agree to allow largely French Quebec, regardless of the size of its population, to have 25 percent of the seats in the House of Commons. One commentator described the process as "a deal-maker but a referendum-breaker."[33] Then, in October 1995, a proposal to make Quebec a sovereign nation was defeated 49.4 to 50.6 percent in a popular referendum. The leader of the separatist *Bloc Québecois*, Lucien Bouchard, said that "the next time will be the right time, and the next time may come sooner than people think."[34]

From this brief account it is possible to draw several conclusions bearing on multiculturalism: The effort to accord recognition and its attendant privileges to one group, cultural or otherwise, will provoke either similar demands from other groups or, especially when the people are brought into the process, a stubborn refusal to make the accommodation. The "Ukrainians" of Manitoba are less likely than their political leaders (at least those at Meech Lake) to indulge the "French" of Quebec. Like other "peoples," especially in a regime that recognizes "peoples," they have pride too. Thus, although the Meech Lake politicians saw the proposed constitutional recognition of Quebec's "distinct society" as merely symbolic and understood that what really mattered was the extent of the powers granted to the provinces, the "people" stamped their feet and said no.

Comparisons with the United States are surely unfair to Canadians; but, if we would avoid its problems, comparisons with Canada can be useful to us. Canada began as two societies and remained two largely separated societies for the better part of its history; and its efforts to build one multicultural society have ended, for the time at least, with a country more divided than ever. Whereas, if (but only for the time being) we put aside the black-white division (which was resolved, to the extent that it was resolved, only by a civil war), America began as one people; and its policy of assimilating, rather than accommodating, its immigrants has allowed it (for the time, at

least) to remain one. It was able to assimilate them because it was able to persuade them that its ways, its rules of justice, and its religious principles were superior to those they may have brought with them.

"All eyes are open, or opening, to the rights of man. The general spread of the light of science has already laid open to every view the palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God." So wrote Jefferson in the last of his many letters.[35] But too many eyes are closed, or closing, today. Today that abstract or palpable truth is too often seen as mere opinion, one opinion among many, and all of them equal, and if our multiculturalists have their way—and if all cultures are equal, why should they not have their way?—all of them to be taught in the public schools. The idea of the rights of man will occupy no special place in such a curriculum. As one of many ideas, its authority is almost certain to be weakened, and with its weakening will come a weakening of the foundation on which we have built the pluralism—and the liberty—we have enjoyed from the beginning.

It is especially likely to be weakened when the loudest voices we hear today are contemptuous of the world built by Jefferson and his colleagues. His invocation of "the light of science" is seen by some as part of a plot, a way of justifying the continued hegemony of his kind, namely, white European males and their white American male coconspirators.

This contempt for things American—at its base a self-contempt—was nowhere better expressed than in the 1993 Bienniel Exhibition of American Art at New York's Whitney Museum. Intended to portray the "victims" of American civilization, the show (described in the catalogue as a "multicultural" exhibition) featured videos and photographs of black gang members, Mexican hookers, battered women, transvestites, female self-portraits with dildos and prosthetic breasts; "installations" displaying a splat of simulated vomit; and, at the end, in cut-out letters two feet high, the statement "In the rich man's house the only place to spit is in his face." As evidence of their having paid the admissions fee, and by order of the museum's director (rich, white David Ross), visitors were required to display a button bearing the words "I can't imagine ever wanting to be white."[36]

Leo Strauss had something like this Whitney exhibition in mind when, in 1968, he wrote that every such accusation presupposes a law—in this

case (so severe were the Whitney accusations) something like a holy law—against which political life is to be measured.[37] One might think that life in the United States could be heaven, or was supposed to be heaven; but the Founders promised no such thing. What they promised was liberty, including the liberty to tend to the salvation of our own souls, and the country they established was the first in all of history to make, and to keep, that promise. By keeping it—here I quote Werner J. Dannhauser—they made "corruption voluntary to an appreciable degree."[38]

The proponents of multiculturalism fail to appreciate what has been accomplished in and by the United States, and their project, when taken seriously, would have the effect—and, in the case of the Whitney people, the intended effect—of undermining its foundation. The future of constitutionalism depends, in part, on our ability to understand this.

Part II

Constitutional and Political Matters

Preface

It was in the context of accounting for the extraordinary role of lawyers in America that Tocqueville pointed out that "there is almost no political question in the United States that is not resolved sooner or later into a judicial question,"[1] or, as he might have meant (and surely could have said), into a constitutional question. It is a fact that, in this country, much of the ordinary business of government—taxing, spending, judging, fighting, punishing—ends up in the courts, ultimately in the Supreme Court. In addition to these, there are constitutional questions as such—that is, questions about the Constitution itself. These are the sort of questions featured in the essays below. For example:

What is the proper relation between the states and the Union? What is required of a territory to become a state? How is a president elected, and what are the rules governing the conduct of the office? What do we mean by rights? Specifically, what do we mean by the establishment of religion, and what is freedom of speech?

These last are First Amendment questions, and most of the essays are devoted to them. Not that it matters much, but I disagree with the Court's "mainstream" and typically liberal answers to them, especially those having to do with speech. I do not expect to change this opinion, but isn't there something to be said for persistence? John Milton must have thought so. As he famously said in his *Areopagitica*, "Let [truth] and falsehood grapple, who ever knew Truth put to the worse in a free and open encounter?"[2]

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States' Rights and the Union

Forrest McDonald is a reputable scholar. Early American historians especially are indebted to him, not only for his important study of the formation of the republic and his celebrated biography of Alexander Hamilton, but because, in his book *We the People*, he convincingly discredited Charles Beard's quasi-Marxist interpretation of the Constitution and, by so doing, removed the shadow Beard had cast over the reputations of its Framers. Thanks largely to McDonald, we now know what we always believed, that the Constitution is not the product of selfish men wanting to feather their own nests.

But the present volume—*States' Rights and the Union: Imperium in Imperio, 1776–1876*—is something else again; indeed, one might well ask why he bothered to write it.[1] McDonald says it is the first "book-length study" of the states' rights controversy.[2] True enough; yet he knows very well—in effect he says—that anyone familiar with the history of the United States during its first hundred years will find nothing new in this book. But how many are they? For the others (and we may have reached the point where this means almost everybody), the book provides an instructive account of this controversy, of the disagreements concerning the nature of the Union and the line to be drawn between the authority of the general government and that of the several states. He says the country was preoccupied with this issue, or with the "tensions" arising out of it, beginning in the days of Hamilton and Jefferson and continuing through the better part of the nineteenth century. Indeed, as he would have it, "the tensions continued to be felt as the twentieth century came to an end."[3]

But "tensions" is hardly the word to describe our situation today, in part because we no longer argue about the nature of the Union; for most of us, at least, that issue was settled in the Civil War. We continue to have our

disagreements, of course, and some of them have something to do with states' rights. For example, we disagree over whether Congress may forbid the carrying of handguns in state and local schoolyards, or require state courts to hear federal claims against state governments; but these disagreements are readily resolved, and everyone agrees that they ought to be resolved, by the Supreme Court. This is a far cry from the days when the champions of states' rights talked of interposition, nullification, and, finally, secession.

Each of these principles—McDonald calls them concepts or doctrines—derives from the basic states' rights proposition that the Constitution is a compact entered into by the states, and, therefore, that the states are entitled to define its terms. Thus, when Congress (in 1798) enacted the notorious Alien and Sedition Acts, Virginia and Kentucky, in resolutions written, respectively, by Madison and Jefferson, declared them to be breaches of the constitutional compact. The powers of Congress are strictly limited, Madison said, and in the case

> of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states, who are parties thereto, have the right, and are in duty bound, to interpose, for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights and liberties, appertaining to them.[4]

Unable to gain support for the resolutions from the other states, Madison and Jefferson set about the task of organizing a political party, and Jefferson, having been elected president in 1800, proceeded to pardon all those who had been convicted under the Sedition Act which, under its own terms, expired in 1801.

After interposition came nullification, a principle associated with the great name of John C. Calhoun. Here the offending act of Congress was the tariff of 1828, known in South Carolina as the Tariff of Abominations. South Carolina responded by adopting an "Exposition," secretly drafted by Calhoun, calling for a state convention authorized to decide whether the law was constitutional. In the meantime, Congress revised the tariff, but only slightly, and in 1832 the convention called by South Carolina adopted the Ordinance of Nullification, declaring the tariffs of 1828 and 1832

unconstitutional and forbidding the collection in the state of the duties levied by them. What followed was a major constitutional crisis involving (among others) Calhoun, Daniel Webster, and President Andrew Jackson, who threatened to send in the army. It was resolved only when Congress adopted a compromise tariff proposed by Henry Clay.

McDonald devotes an entire chapter to the secession crisis, and many prior pages to the issue that provoked it, slavery. What is of interest here is that he thinks the champions of states' rights—principally Jefferson, Calhoun, and ultimately Jefferson Davis—had the better of the argument about the nature of the Union. (Calhoun, he says, "decisively demonstrated the soundness" of their view in the Senate debates over nullification.) They claimed that there was no United States prior to the ratification of the Constitution in 1787–88, that it came into being with the Constitution, which was the work of "sovereign" states. The Confederates took this to mean that the states, having formed the Union, were entitled not only to "nullify" what they saw as infractions of it, but to secede from it.

Lincoln, of course, disagreed; he insisted that the Union was formed when we, as "one people," declared our independence in 1776, but McDonald says this view is "untenable." As it happens, Lincoln was right, and can be proved right by the Constitution itself. There, specifically in article 7, we read that it was written (and sent to the Continental Congress, which, in turn, was to send it out for ratification) on "the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence *of the United States of America the Twelfth*" (emphasis added). As Lincoln said, and said again in the first line of his Gettysburg Address, the United States was born in 1776.

This is not an unimportant matter. For if Lincoln was wrong, the Confederates were right, and if they were right about the Union, they were right about secession and their stand in the war that followed it. The war, then, was Lincoln's doing and, as the unreconstructed Confederates insist even today, he was wrong to fight it. Does McDonald agree with this?

He does not say, but, for some reason having nothing to do with the states' rights controversy, he criticizes Lincoln severely for the way he fought the war. Lincoln, he says, violated the Constitution time and again. Unlike the "moderate" Jefferson Davis, he "rode roughshod" over those who opposed him, repressing the disloyal "with a vengeance," and he used

"coercion" to keep the border states in line and the army to control elections.[5] McDonald goes so far as to say Lincoln's Emancipation Proclamation "actually freed no slaves," but that "it served its purpose, for Britain and France ultimately abandoned the idea of intervening" in the war.[6]

This would have been a better book had McDonald confined himself to the facts. His judgments are not only unnecessary but mistaken and offensive.

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Talkers

Our presidents have become big talkers; Bill Clinton, for example, was forever on the radio or running around the country making speeches, pounding the lectern, and asking the public to support his legislative programs. Rather than object, the people think it altogether appropriate that the president should address them directly and on radio and television. Everyone else does, everyone with something to sell, so why shouldn't the president? Still, there was a time when presidents were supposed to confine their talking to written communications addressed to the Congress.

In 1868, Andrew Johnson was impeached and put on trial before the Senate, in part, at least, because of his practice of making public political speeches; presidents were not supposed to do this. Accordingly, the tenth of the impeachment articles against him reads, in part, as follows:

> That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and the dignity and proprieties thereof, and of the harmony and courtesies which ought to exist and be maintained between the executive and legislative branches of the Government of the United States [did] openly and publicly, and before divers assemblages of the citizens of the United States convened in divers parts thereof, make and deliver in a loud voice certain intemperate, inflammatory, and scandalous harangues, and did therein utter loud threats and bitter menaces as well against Congress as the laws of the United States duly enacted thereby, amid the cries, jeers, and laughter of the multitudes then assembled and within hearing.[1]

As we know, he was acquitted—but only by the margin of one vote—although the Senate never got around to voting on this particular charge.

The first president to be formally charged with high crimes and misdemeanors, Johnson was not, however, the first to be criticized for taking his case directly to the people. That dubious distinction belongs to Martin Van Buren who, during the last year of his term, made a tour of his home state of New York and turned it into a campaign for reelection and, interestingly enough, was rebuked for it. Received by a huge crowd in New York City, he began his remarks by saying, "I am cheerfully and gratefully affected by this cordial reception by my Democratic fellow citizens of New York City and county of New York." As Jeffrey Tulis reports in the best book on this subject, *The Rhetorical Presidency*, "This was the extent of his partisanship, but it provoked a storm of protest."[2] Whig politicians on the governing councils of three of the towns Van Buren later visited managed to pass resolutions declining to receive him—the president of the United States!—because of what was thought at the time to be the impropriety of that remark. An outdated notion? Not entirely. In 1994, Texas representative Richard Armey was severely criticized when, by way of responding to the charge that Republicans were blocking legislation simply to deny Clinton a legislative victory, he said, "*your* president is just not that important to us."[3] In one important respect at least, a president is supposed to be nonpartisan, the president of all the people and not merely of those who voted for him.

It was not so much his partisanship, however, but the mere fact of appealing directly to the people that led to Andrew Johnson's impeachment. His trial was unprecedented, but his alleged offense was one the Founders warned against. "Of those men who have overturned the liberties of republics," we read in the first of the *Federalist Papers*, "the greatest number have begun their career by paying obsequious court to the people, commencing demagogues and ending tyrants." In that preelectronic age, popular appeals were thought to violate constitutional principles, particularly those prescribing the legislative process.

The argument went as follows: The legislative power, the first in the constitutional order, belongs to Congress; the president's legislative role, as stated in article 2, section 3 of the Constitution, is limited to providing "Information on the State of the Union" and recommending "such Measures as he shall judge necessary and expedient." But, as the Constitution makes

clear, this information and these recommendations were to be delivered to the Congress, not to the people, and the practice throughout most of the nineteenth century was to deliver them in the form of written communications. (Thomas Jefferson initiated this practice and Woodrow Wilson, who wrote a book arguing that the Constitution's legislative process was outmoded, began the modern practice of delivering State of the Union messages orally.) Presidents probably expected the public to read them, but the fact that they were written, and formally addressed to the Congress, guaranteed the absence of anything resembling a demagogic appeal.

Aside from issuing proclamations, or responding to addresses or "serenades," presidents spoke directly to the people mostly on special occasions: on assuming office (and, in George Washington's case, on leaving it), or to dedicate the opening of the Erie Canal and, for the most famous example, the cemetery at Gettysburg. Before the coming of radio and television, even presidential candidates kept aloof from the public, issuing no statements on their own behalf and making no speeches. When running for the Senate in 1858, Abraham Lincoln crossed the state of Illinois, debating his opponent, Stephen A. Douglas, before huge crowds, but in 1860 he stayed at home and kept his mouth shut; the presidency was thought to be different.

Things began to change with Theodore Roosevelt, who spoke of the office as a "bully pulpit," and the change was institutionalized by Woodrow Wilson. This is not the place to discuss the changes Wilson made and why he made them—Tulis devotes a chapter to the subject—but, generally, Wilson sought to refashion the constitutional order along the lines of the British model: government by majority party, with the president as party (and popular) leader. Modern technology rendered this easier. The consequences, not all of them intended by Wilson, are familiar to us.

The Constitution, praised in *Federalist* 63 for excluding the people "*in their collective capacity*" from any share in the government, has been popularized. As Jimmy Carter put it—and I don't recall anyone finding it inappropriate—we want "a government as good as the people,"[4] and not, as the Founders intended, a government ultimately dependent on but better than the people.

To an ever-increasing extent, the president takes his case directly to the people, as if his authority to act comes from them rather than from the Constitution. Thus, to justify his Haitian policy, President Clinton went on

television, not to the Congress, and in his speech said nothing about the Constitution. All this talking requires him to employ a corps of speechwriters, who, along with the press secretaries, play an essential role in the governing process.

The role of the press itself has been enhanced. First invited to the White House by Theodore Roosevelt, the press now occupies extensive quarters in it and has become a fourth—and as tribune of the people, not the least—branch of government.

Political pollsters, beginning with Pat Cadell under Jimmy Carter, now have White House passes, giving them ready access to the presidents, who, in turn, are provided with accurate assessments of their popularity with the people. It's no wonder that Bill Clinton, for example, found it necessary to talk so much; so did one of his immediate predecessors who, in some circles at least, was praised as a "great communicator." We have come to expect our presidents to be popular leaders, populists in effect, and, given our enhanced electronic "networking" capacities, there is little reason to think we have seen the end of the process. Ross Perot, an expert in "playing obsequious court to the people," may have been the herald of our future. Our biggest talker yet, he promised, if elected, to institute an "electronic town hall," or a government by call-in show. The people, under no obligation to think before they talk, would tell him what they wanted, and he promised to oblige them. He further promised to resign if he failed to oblige them. If he had succeeded, we would have had a popular government incapable of doing anything unpopular, which, inevitably, would mean unpopular with a majority determinable by plebiscite. The Founders called this—see *Federalist* 47—one of the forms of tyranny.

9

Why a Vice President

Why should anyone want to be vice president? One of the men who held the post spoke of it as "the most insignificant office" ever contrived by the wit of man, and the men who wittingly contrived it—I mean, of course, the Framers of the Constitution—may have been of the same opinion.[1] At least, they said nothing whatever about the qualifications of those who were to hold the office; unlike presidents and members of the House and Senate, vice presidents, so far as the Constitution is concerned, may be of any age or even any nationality.

But the vice presidency is taken more seriously today than it apparently was by the Framers of the Constitution. The reason for this has nothing to do with the office itself—after all, its powers are almost nonexistent—and much to do with a presidential candidate's chances of winning election. Interestingly enough, the reason the Framers created the office in the first place had something to do with—in fact, had *only* to do with—the election of the president.

The Framers had a hard time settling on the method by which the president was to be chosen. It was proposed, successively, that the president be chosen by the national legislature, by a part of the legislature, by state governors, by popular vote of the people, by electors appointed by the state legislatures or the national legislature, chosen in districts within the states, or by the people directly.

But there were objections to each of these methods. A chief executive chosen by the Congress would make him its agent, which would be a violation of the principle of the separation of powers. If chosen by state governors, "the executive . . . will not be likely to defend with becoming vigilance & firmness the National rights against State encroachments."[2] By popular vote of the people? But George Mason of Virginia "conceived it

would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours to a blind man."[3] Besides, said Hugh Williamson of North Carolina, "The people will be sure to vote for some man in their own State, and the largest State will be sure to succeed."[4] By electors appointed by the state legislatures? This proposal engendered no discussion whatever; put to the vote, only Maryland and Delaware favored it. "We seem," said Elbridge Gerry of Massachusetts on July 24, "to be entirely at a loss on this head." Indeed they were. As James Madison said the next day, "There are objections against every mode that has been, or perhaps can be proposed."[5]

What is of interest here is that during the entire course of the debate, which began in May when Edmund Randolph introduced the so-called Virginia Plan for the Constitution and continued for over three months, no mention was made of a vice president.

This was not the result of oversight. The convention was aware of the necessity to provide for the case of the president's removal, death, or resignation. Thus, in its report of August 6, the Committee on Detail recommended that, in such an event, "the powers and duties of his office" be exercised by the president of the Senate. The office of vice president did not make its appearance until September 4 when, in its report, the Committee on Unfinished Parts recommended the establishment of the electoral college.

As adopted in the Constitution, the report provided that the electors were to vote for two persons, "of whom one at least shall not be an Inhabitant of the same State with themselves," and "the Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed. In every case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be vice president."[6]

A careful consideration of this provision reveals why we have a vice president. Each elector was given two votes, both to be cast for president (it was not until the adoption of the Twelfth Amendment in 1804 that electors were required to cast one vote for president and the other for vice president). Why two votes? Because, if each elector had one vote, and if he cast it for "an Inhabitant of the same State with [himself]," no one would win an electoral college majority, and the choice of the president would devolve

upon the Senate (subsequently changed to the House of Representatives). But give the electors two votes each and the result would likely be the same because, without a second office to fill, they would have reason to "throw away" their second votes.

Consider the situation that would have attended the selection of the first president had George Washington (everyone's first choice) *not* been a candidate. There were sixty-nine electors casting a total of one hundred thirty-eight votes for president. The number required for election was thirty-five ("a Majority of the whole Number of Electors appointed," not a majority of the ballots cast). If, as the Framers assumed, most electors were to cast their first votes for a favorite son, no one would win a majority, and the issue would turn on the second votes. How would they be cast? Would the Virginians, for example, having cast their first votes for Thomas Jefferson, cast their second for John Adams? Not likely. To do so might give Adams (Massachusetts's favorite son) the thirty-five votes needed for election. They would be more likely to cast them for, say, Daniel of St. Thomas Jenifer of Maryland, or (except that he had been killed in a duel) Button Gwinnett of Georgia—someone for whom no other elector was likely to cast a second vote. In a word, to enhance the chances of their first choice, electors would be inclined to "throw away" their second votes.

The vice presidency was created to make it less likely that electors would do this. With two offices to fill, and knowing that the vice president would succeed to the office in the event of the president's death or removal, they would have reason to cast their second votes for the best man from some other state rather than for a nonentity. "Such an officer as vice-president was not wanted," said Hugh Williamson on September 7. "He was introduced only for the sake of a valuable mode of election which required two to be chosen at the same time."[7] Exactly.

The vice president's only constitutional duty is to preside over the Senate (and cast a vote only in the event it "be equally divided"), and he was given that assignment only because, as Roger Sherman put it, "he would [otherwise] be without employment."[8] With little to do—Dick Cheney is an exception to this—most vice presidents have spent their time in office doing little, and the republic is none the worse off for the little they did; but nine of them succeeded to the presidency—a fact that political parties would do well to remember when choosing a president's running mate.

10

Two-and-a-Half Cheers for the Electoral College

Andy Warhol once said that everyone has fifteen minutes of fame during a lifetime—or, at least, is entitled to fifteen minutes of fame. His began when he painted his picture of a box of Brillo, or of a can of Campbell's tomato soup, and it lasted for the rest of his life. Mine (such as it was) began on November 8, 2000, the day after the election, and lasted for six weeks. During that period, I had at least a hundred telephone calls from reporters—mostly American, but a number of them foreign—with questions, generally "what if" questions, concerning the electoral college.

For example, what if Florida is unable to appoint its 25 electors by December 18, the day electors meet in their various state capitals to cast their votes for president and vice president? Implicit in this question was another: Would Al Gore then be president? The answer is yes. The Constitution (first in article 2, section 2, and then in the Twelfth Amendment) says, "The person having the greatest number of votes for President, shall be the President, if such Number be a Majority of the whole Number of Electors appointed"—not the whole number of electors (538) but the whole number of electors *appointed* (513, or 538 minus 25). Leaving aside Florida, Gore had 268 electors, more than the required 257, a majority of the 513. (As it happens, the Framers of the Constitution anticipated the failure of a state to act, and added the word "appointed" to meet that situation. See the convention debates for September 5, 1787.)[1]

For another example, what if the choice of the president goes to the House of Representatives? Will it be the old or the new House that makes the choice? The answer is, the new House. According to the Twentieth Amendment, the terms of House members end at noon on January 3, and,

under the relevant federal statute, electoral votes are counted on January 6. But what about the choice of a vice president? Under the Constitution, that decision is made by the Senate, the Senate seated on January 3, which, as it happens, will consist of fifty Democrats and fifty Republicans in 2001. Will Al Gore, as president of the Senate, be able to break the tie and vote for himself? Again, the answer is yes, because, under the Twentieth Amendment, the terms of president and vice president do not end until noon on January 20. But suppose the House cannot agree on a president, and the Senate on a vice president, what happens then? The answer is—see section 19 of the federal statute—the Speaker of the House of Representatives becomes acting president, provided he resigns as speaker and his seat in the House. But suppose—as is altogether likely, since his term as acting president will end as soon as a president or vice president is chosen—he refuses to resign? Well, then, the president pro tempore of the Senate shall, "upon his resignation as President pro tempore and as Senator, act as President." But suppose—and again it is altogether likely—*he* refuses to resign? Well, under the presidential succession act, the secretary of state shall act as president. But the secretary of state, Madeleine Albright, is not eligible because she is not a natural-born citizen. Well, then, the job will go to the next in line, the secretary of the treasury, Larry Summers, and, if necessary, down the list of cabinet members until we reach the secretary of veterans affairs. It is only after him that we would have a problem, and this is a problem that is not likely to arise.

I was asked these and other questions because, as the editor of a book entitled, *After the People Vote, A Guide to the Electoral College*, it was assumed that I knew the answers. What is important here is not that *I* knew the answers but, rather, that there *were* answers. This is important because succession to office, particularly the highest offices, should not be left to chance—for example, whether the wife of a monarch is able to produce an heir, or a male heir—or to the dictates of force; rather, it should be governed by rules, as in our case, by constitutional, statutory, and parliamentary rules, providing for almost every conceivable contingency. And this we have done. Thus, in my judgment, no one—at least, no friend of constitutional government—has reason to complain of the method by which this country chooses its presidents, not so long as these rules are followed.

But is it a rule that electors actually vote as they are expected, or in some cases, as they are pledged to vote? Constitutionally, they may vote as they please; indeed, the electoral college was adopted with this in mind. Unlike the typical citizen in the late eighteenth century, who, it was assumed, would be likely to vote for someone from home, so to speak—someone from his own state—it was expected that the electors would be persons active in public affairs, and, therefore, would know the qualifications of persons from other states, and would vote accordingly.

But the situation quickly changed with the advent of political parties which, by nominating presidential candidates, took the original decision out of the hands of citizens and electors alike; and it was only after that that we began to speak of "faithless electors." The term itself has no place in the Constitution as written; to speak of an elector as "faithless" suggests that the constitutional rule has been superseded by custom, or, more likely, by state law or political party rule—for example, laws or rules pledging an elector to vote for the candidate of his party. Hence, the question, a constitutional question: May electors be punished if they violate their pledges? In 1952, a divided Supreme Court of the United States upheld the legality of a pledge required by a political party from *candidates* for the office of presidential elector; but the Court did not address the issue of whether a pledge required of an *elector* was legal and could be enforced.[2] This, then, is a question for which, as yet, there is no answer.

But the issue arose as early as 1912 when, in Kansas, eight of the ten electors who were pledged to vote for the Republican candidate William Howard Taft, announced that, if elected, they intended to vote instead for Theodore Roosevelt. As one might expect, the Taft supporters went to court, and, after losing in the Kansas courts, petitioned the Supreme Court for a writ of error. The petition was considered by two of the justices—and never reached the Court as a whole; therefore, there is no record of the case, *Marks v. Davis*, in the Court's official reports—and, after argument, they issued the writ. By doing so, they indicated that, in their judgment, the Court had jurisdiction in the case, which is to say, they decided that there was a *federal* question involved in it, that it was not solely a matter of state law. This is of some interest today because, in November 2000, the Supreme Court took jurisdiction in the case of *Bush v. Gore*, and rendered a judgment that put an end to the Florida dispute.

But, to return to Kansas, what about the issue of whether electors might vote as they please?

The two justices (Van Devanter and Pitney) had no reason to answer that question because, at the last moment, and I mean literally at the last moment, the Taft people succeeded in getting a slate of Taft electors on the ballot. In the event, the Roosevelt slate was elected in Kansas, but Woodrow Wilson, the Democratic candidate, won the national election.

As it happens, there was one faithless elector in 2000, in the District of Columbia, who, instead of voting for Al Gore, as she was pledged to do, cast a blank ballot for president. But her vote had no effect on the outcome, other than making the final count, 270 for Bush and 267, rather than 268, for Gore. As we all know, this was a very close election, and might have gone the other way if three Bush electors could have been persuaded to switch to Gore. One prominent Democrat suggested that an effort be made to find such electors, but nothing came of this, either because no such effort was made or because no such electors could be found. But this sort of mischief—of electors being cajoled, or bribed, or blackmailed—remains a possibility, and it is this that accounts for the title of this essay: two-and-a-half (not three) cheers for the electoral college. We could make it three if, by amending the Constitution, the states were given electoral votes, rather than electors.

But its critics want more than that. Their complaints are familiar. The electoral college, they say, is a relic, an absurdly dangerous method of selecting a president, one that threatens to plunge the nation into political chaos. The presumed danger is that a candidate might receive a majority of the electoral vote while receiving fewer popular votes than his or her opponent. They speak of this discrepancy as a "time-bomb waiting to go off," but the last time it did go off, in 1888, it proved to be a squib, and nothing happened. There was hardly a ripple of popular discontent, no spate of editorials claiming that Benjamin Harrison was an illegitimate president, no complaints from the losing candidate, Grover Cleveland, that he had been cheated. Indeed, when asked by a reporter the day after the election to what he attributed his defeat, Cleveland smiled and said, "It was mainly because the other party got more votes."[3]

It was different in 2000. No sooner had the election results been reported—showing that Gore had won the popular vote but was likely to

lose the electoral vote—when Al Gore's campaign chairman claimed fraud, and Democrat Hillary Rodham Clinton, and even Arlen Spector, nominally a Republican, called for the abolition of the electoral college in favor of a direct popular vote.

Now, one of the virtues of the electoral college is, or was, that it regularly produces a president with a clear, immediate, and legitimate claim to the office, in part because it amplifies the margin of victory in the popular vote. In 1960, for example, John F. Kennedy won only 49.72 percent of the popular vote (as opposed to Richard Nixon's 49.55 percent), but Kennedy's margin in the electoral college was 303 to 219. In 1968, for another example, Nixon won 43.42 percent, Hubert Humphrey 42.72 percent, and George Wallace 13.53 percent of the popular vote, but Nixon's electoral college margin was 301 to 191 to 46. This did not happen in the 2000 election. Not only did our system not amplify the popular vote margin, but, for the first time since 1888, the candidate with a plurality of the popular vote did not win the electoral vote. In fact, the electoral vote was so close that we did not know, immediately, who was president; everything turned on Florida, where the popular vote was too close to call, and, as we all know, the outcome was not determined until the Supreme Court acted on December 12, six days before the electors were scheduled to meet in their state capitals to cast their votes.

Is there, then, any reason to believe that the country would have been spared this situation, this uncertainty as to who was elected, if we had a system of direct popular election of the president? Before pursuing this subject, I want to say a few words in defense of the Supreme Court and its December 12 decision.

As we know, the Court was accused of interfering in a matter that was none of its business, that its decision to put an end to the vote recounts in Florida was both unprecedented and, because the recounts could have been completed in the time available, unnecessary; that it was nothing more than a decision rendered by Republican justices to ensure the election of a Republican president.

But consider what would have happened if the Court had not intervened. The recount would have continued, and, by counting all those "dimpled" ballots, Gore probably would have been declared the winner of the popular vote in Florida. The Florida Supreme Court, which ordered the

recount, would then have ordered the governor to certify a Gore slate of electors. But in the meantime, the Florida legislature had convened for the purpose of certifying a slate of Bush electors. So there could have been two slates of electors, and the Congress of the United States, meeting on January 6 in joint session, would have had to determine which slate was "regularly given." Not surprisingly, there is a statutory rule governing even this situation. I quote from the statute:

> [In case] of more than one return or paper purporting to be a return from a State . . . then those votes, and those only, shall be counted which the two Houses [that is, the House of Representatives and the Senate] shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. [And suppose there are two slates, each certified by the executive of the State?][4]

All clear? Actually, yes. But clearer still is the *probability* of nasty partisan wrangling with the *possibility* of a delay in reaching a decision—and all this just two weeks before the new president, whoever he is, and his cabinet, whoever they are, are scheduled to take office! There was talk in 2000 that the transition period, the time during which the new administration prepares to take office, was too brief. But suppose, instead of six weeks, it had been two? I don't *know* if the Court had this in mind when it decided to intervene, but I suspect it did, and, in any case, we, Democrats and Republicans alike, should be grateful.

But, to return to that other matter. I asked earlier whether there is any reason to believe that the country would have been spared the Florida situation—meaning the delay and the uncertainty as to who was elected president—if, instead of by the electoral college, presidents were selected by a direct popular vote. Under the present system, the delay and

uncertainty were caused by the necessity to recount in Florida; we did not have to recount in Texas, New York, or California, to say nothing of Illinois, even though there is no reason to believe there were no dimpled ballots in Texas, or hanging chads in New York, or deliberate miscounts in Cook County, Illinois, where the Daley machine is still in power. Why not? Because the margin of victory for Bush in Texas, and for Gore in these other states, almost surely exceeded the number of miscounted, or uncounted, ballots. But under the alternative proposed, every vote, everywhere would matter, in a way they do not matter under the present system. And in any close election—and most of our presidential elections are very close—we would have reason to recount everywhere, not only in Florida.

This would plainly be the case with the system favored by the reformers. Under that system, the nation forms a single electoral district; the candidate with the most popular votes wins, provided he wins at least 40 percent of the votes cast; failing that, the plan calls for a runoff between the top two candidates. In this one national electoral district would be 180,000 local polling places, all equally important because, as I said, every vote everywhere matters—and not only the votes cast for one or the other of the major party candidates, but those cast for any of the minor party candidates. No longer could the argument be made that a vote cast for Ralph Nader, for example, or Pat Buchanan, or, thirty-two years earlier, for George Wallace, is a "wasted vote"; under the proposed system, there would be no such thing as a "wasted vote." In 1968, the 4.1 million votes cast for Wallace outside the states he carried were "wasted," because they gained him no electoral votes; but they would not have been wasted under a system of direct popular vote. Indeed, there probably would have been more such votes because Wallace's support faded from a high of 23 percent, in a September opinion survey, to an actual popular vote of 13.5 percent in the November election, at least in part because of the wasted vote argument.[5] So, if not three, then at least two-and-a-half cheers for the electoral college.

The critics of the electoral college are unmoved by any of this. The present system is undemocratic, they say, and, so far as they are concerned, this is all that matters.

But have we really reached the point where the right to hold a public office depends *solely* on the suffrage of a popular majority? Are the

friends of direct popular election really willing to say that a candidate with a *constitutional* but not a popular majority is an illegitimate president? Perhaps, but only if the moral authority of the electoral college—indeed, of the Constitution itself—has been undermined by the persistent efforts to get rid of it, especially the efforts of members of Congress and what the British call the "chattering class."

The electoral college, they say, is a violation of the democratic principles of one man, one vote, and the majority rules. In fact, of course, the majority now rules, not necessarily nationally, but at the state level where (except in Maine and Nebraska) the popular votes are aggregated. As it happens, this is where the vote of any particular minority looms larger, or carries more weight, than it is likely to do in the country as a whole. So long as a minority is not evenly distributed throughout the country, it is in its interest to oppose direct popular elections; civil rights leaders used to understand this. And is there not something to be said for an electoral system that threatens to penalize a political party and its candidate for failing to respect the rights of minorities? Furthermore, is there not something to be said for an electoral system that protects the interests of states as states, which is to say, a system with an element of federalism built into it? Only twice in the twentieth century (1960 and 1976) has the candidate with an electoral college majority failed to win a majority of the states. (Bush, the electoral college winner in 2000, won thirty of the fifty states.) And is there not, then, something to be said for a system that threatens to penalize sectional candidates?

The American idea of democracy cannot be expressed in the simple—simple but insidious—formula, the greatest good of the greatest number. What the greatest number regards as its greatest good might very well prove to be a curse to those not part of that number. The American idea of democracy, which is expressed in the Declaration of Independence and embodied in various provisions of the Constitution—the principle of representation in the Senate, for example, and the district system in the House, as well as the electoral college—is that government is instituted to secure the rights of all. To this end, we also have a Bill of Rights. Finally, what is constitutionalism if not a qualification of majoritarianism?

The men who founded this country surely recognized the entitlements of a popular majority, but, with an eye to the qualifications for or the

qualities required of an office, they devised institutions—the electoral college is one of them—that modify or qualify the majority principle. Nothing could be clearer than that the Founders sought institutions or ways—Alexis de Tocqueville called them "forms"—that would protect the country from what has come to be called populism. As I said, the organizing principle of the Senate is surely not majority rule, nor are its procedures simply democratic. Federal judges are not elected at all. They are appointed by the president, with the advice and consent of the Senate, and they serve for life. If legitimacy springs only from the principle of one man, one equally weighted vote, upon what meat do these, our judicial Caesars, feed? For that matter, if populism is our only principle, why should we have elections? Why not select all public officials by lot? This would be truly democratic, because it pays no attention whatever to the qualifications of officeholders—or assumes that everyone is equally qualified.

In short, the issue that ought to engage our attention is the one the Framers debated over the entire course of the Constitutional Convention, from May 1787 to September, namely, what way of election is more likely to produce a president with the qualities required of the person holding this great office? In all the years I have been engaged in this debate, in all the times I have testified on this issue before a House or Senate committee, I have yet to encounter a critic of the electoral college who argues that a president chosen directly by the people is likely to be a *better* president. And that, surely, is the issue.

My argument was best made by an old and close friend, the late Professor Herbert Storing, when, in 1977, in testimony before the Subcommittee on the Constitution of the Senate Judiciary Committee, he said,

> To see the case for the present system of electing the president requires a shift in point of view from that usually taken by the critics [of the electoral college]. They tend to view elections in terms of *input*—in terms of the right to vote, equal weight of votes, who in fact votes, and the like. The framers [of the Constitution] thought it at least as important to consider the *output* of any electoral system. What kind of man does it bring to office? How will it affect the working of the political system? What is its bearing on the political character of the whole country?[6]

If, then, James Madison, Alexander Hamilton, James Wilson, Benjamin Franklin, Gouverneur Morris, and the rest thought it important to consider *output* as well as *input* when designing the electoral system, I think that we today are obliged to do the same when considering proposals to amend it.

11

Civil Not Natural Rights

There is a question as to why the Beacon Press would choose to publish a collection of Wendy Kaminer's essays, *Free For All: Defending Liberty in America Today*.[1] It is not enough to say, as she does in a prefatory note, that "civil liberties are always in jeopardy and always require attention."[2] Fair enough, but she and her libertarian colleagues have made a career of saying just that. So why say it again? There is nothing new in these essays, all of them previously published and none of them distinguished in any way.

Numbering about fifty, they deal with such topics as sexual freedom, abortion rights, gay marriage, assisted suicide, and the medical use of marijuana, all of which she supports; as well as racial profiling, the death penalty, the war on drugs, "flag worship," and censorship, all of which she opposes. In still others—"An Imperial Presidency," for example, and "Safety and Freedom"—she comes to grips (so to speak) with the exigencies of our present situation. While written before 9/11, all the essays were "updated" later; she makes a point of this, presumably, to assure us that she appreciates the greater relevance after 9/11 of national security considerations. In any event, this appreciation amounts to very little.

The most that might be said is that Kaminer is not unmindful of the importance of national security, but she speaks disdainfully of every measure designed to promote it. The airport security measures are not only intrusive, she says, but "unnecessarily" so; moreover, they were adopted only because of the untoward influence of large but otherwise unidentified corporations. The requirement to display a photo ID card before boarding a plane is a useless security measure, in fact, an "idiotic" security measure, and was adopted only because it is "an effective revenue enhancer that enables the airlines to catch passengers using other people's discount tickets."[3] As she sees it, the whole security business is something of a scam; she

refuses to believe the (unidentified) officials who tell us that sacrificing freedom will make us more secure. "Most of them," she says, really want us "to have less freedom just so they can have more power, regardless of security."[4] This is a serious, in fact, a reckless charge, but she apparently sees evidence enough to support it in the laws enacted after 9/11, particularly the Patriot Act, and the way the laws, old and new, are being enforced. Her conclusion is that, while we don't yet inhabit a police state, "it is not paranoia that imagines one taking shape."[5] Her friend, Katha Pollitt, may have had statements like this in mind when she said, on the book's back cover, "Wonderful Wendy Kaminer! With wit and style and cold hard facts, she skewers contemporary credulity."

After all this, it comes as something of a surprise to learn that Kaminer's views on this subject do not differ all that much from those of the general public. "Ask people to choose between freedom and security," she says, "and almost all will choose security."[6] But, nominally at least, so does she. She does so because, like them, she believes that "freedom depends on peace and some measure of order, after all."[7] So it does, after all; but, perhaps because the American Civil Liberties Union spends its time defending the rights of unpopular minorities—anarchists, pornographers, flag-burners, left- and right-wing zealots—she overlooks the fact that the popular majority also has rights, specifically and of most consequence here, the right to peace and some measure of order—in a word, to security. This right deserves as much respect and protection as freedom of speech and the other rights explicitly mentioned in one or another provision of the Constitution, and more respect and protection than that so-called right of privacy derived from "penumbras formed by emanations" from a potpourri of provisions.[8] But she says nothing about this. Beyond that, it should be said that freedom and security are not so much at odds as she sometimes makes them out to be.

The key here is how we understand freedom, or, more precisely, our constitutional rights. For example, correctly understood, it is not a denial of a defendant's right to due process if, thanks to the Patriot Act, the government is allowed to avail itself of foreign intelligence information in a domestic criminal case. Kaminer thinks otherwise.[9] Nor, correctly understood, is it an abridgment of our First Amendment right of freedom of speech and press to prohibit child pornography on the Internet. But Kaminer, ever mindful of the alleged slippery slope, insists that the right is

meaningless unless it protects, say, "A Child's Deep Throat" as well as "Anne of Green Gables."[10] Wonderful Wendy, indeed. But this can truly be said of her: She treats civil rights as if they were natural rights and, by doing so, exaggerates their extent or reach.

She is not the first of her tribe to do this, just as she is not the first to speak repeatedly of "autonomy" and "autonomous individuals."[11] The autonomous individual is said to have "antecedent rights against the state," including the right to say or print whatever he pleases, irrespective of its effect on the state.[12] In principle, this means (as the fashion now has it) that the right has priority over the good, a principle given at least quasi-official status in an opinion written by Justice Oliver Wendell Holmes (Kaminer's favorite jurist) in a free speech case decided by the Supreme Court of the United States in 1925. Holmes said, and among libertarians became famous for saying, "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[13] If we take him at his word, as libertarians are wont to do, this means that it is worse to suppress the advocacy of Stalinism or Hitlerism than to be ruled by a local Stalin or Hitler. So much for autonomy and its principle. The fact is, of course, there are no autonomous individuals in this country, none at all; leaving aside visitors, there are, instead, only citizens and aliens, all of them living under the jurisdiction of the law and expected to obey it, and with the collective right to peace and some measure of order under it.

There was a time when, in theory—venerable liberal theory—all of us were autonomous individuals, when there were nothing but autonomous or radically independent and self-governing individuals. Living then in the state of nature, we had nature's rights, but these rights were not secure, and could not there be secured. The state of nature proved to be a state of war, with the consequence that our lives were "solitary, poor, nasty, brutish, and short."[14]

The way out of this most unhappy situation was found by Thomas Hobbes, the political philosopher who coined that phrase. Hobbes, followed by John Locke, asked the political question, What sort of society or *social* bond can be established among persons who are by nature asocial and with the right (the "antecedent" right) to do as they please?[15] To put the question otherwise, what are the preconditions of a society formed of

naturally autonomous individuals, or what portion of that autonomy is retained after society is formed? Or, again, since the autonomy is defined by natural rights, which rights does the individual retain, and which must he surrender when entering society?

These are not questions of interest only to theoreticians; on the contrary, they were asked and answered at our beginning as a people. Writing in *Federalist* 2, Publius—John Jay in this case—said, "Nothing is more certain than the indispensable necessity of government; and it is equally undeniable that whenever and however it is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers." Which rights are ceded (or surrendered), and which are retained?

Strictly speaking, the only one retained is "the Right of the People" we exercised in 1776 and, if necessary, stand prepared to exercise again. All other natural rights are surrendered, in exchange for the civil rights that society promises to secure.[16] A civil right is a civilized version of a natural right, by which I mean, it is the result of reflections on what is necessary, first, to constitute a society, and then to govern it. By treating them as natural rights, Kaminer would deprive the government of the powers required in times of danger. And to do this would be to deprive the people of their right to peace and some measure of order.

12

Flag-Burning and Other Modes of Expression

The summer of 1989 brought no peace to Washington. Thanks to the Supreme Court, the issue of abortion went back to the states whence it had come sixteen years earlier. But, as if in return, Washington was given patriotism and obscenity when the Court upheld the burning of the flag by an angry Gregory Johnson[1] and when an embarrassed Corcoran Gallery canceled an exhibition of Robert Mapplethorpe photographs.

Johnson was angry with the United States, which proved to be his salvation because, as the Court explained, the First Amendment protects angry political expression, but not, if such exists, pointless political expression—for example, flag-burning just for the fun of it. The Corcoran was embarrassed, not by the Mapplethorpe photographs themselves, but by its decision to cancel the exhibition, thereby surrendering its principles to a phalanx of angry congressmen led by "the unspeakable [Senator] Jesse Helms," as he was called by the *Washington Post*, "America's Number One Yahoo."[2] After all, the Corcoran is an art gallery, and Robert Mapplethorpe was an artist, and it follows, at least in the art world it follows, that everything done by an artist is art. Art, like angry flag-burning, is one of the modes of expression, and expression is said to be protected by the First Amendment.

According to Robert McCormick Adams, the head of the Smithsonian Institution, even graffiti are (or is) art—including, we are entitled to ask, even graffiti spray-painted on the exterior walls of one of the Washington museums entrusted to his care, for example, the National Gallery's East Wing, of which he is a trustee? After all, by definition graffiti are words or pictures scratched or painted on a public surface, and the East Wing provides public surfaces much grander, cleaner, and, one would think, much more inviting

than any available in New York City subways. So grand, in fact, and so clean, that one wonders why no one has yet taken advantage of them. (Perhaps we can thank the corps of dogs employed by the Smithsonian to police its grounds and buildings.) Still, notoriety awaits the first to do so, just as notoriety, of a sort, was won by the anonymous New York subway "graffitists" when, with the help of a grant in the amount of some $160,000 from the National Endowment for the Arts ("Your Tax Dollars at Work!"), a film was made depicting their work, and not only depicting but celebrating it.

Rather than celebrate it, Adams would surely call the police, the FBI, or the U.S. Attorney's office, if someone were to spray graffiti on any of the Smithsonian buildings. Graffiti may be an art, and art may be a form of expression, and expression may be protected by the First Amendment; but surely, he would protest, there are limits. He might cite a few Supreme Court decisions having to do with time, place, and manner. At a minimum, we would expect him to be outraged; but outrage was all Jesse Helms was expressing, at least initially. He thought it outrageous that public money, like public surfaces, should be made available to the likes of Robert Mapplethorpe.

One doesn't have to be a "yahoo" to agree with Helms on this point. Like Gregory Johnson, Mapplethorpe was undoubtedly expressing himself; indeed, unlike Johnson, he was expressing himself in the etymologically precise sense of the term. According to the unabridged Oxford English Dictionary, expression originally meant "the act of pressing or squeezing out," hence, "to expel or get rid of by force." Just so, in one of his photographs Mapplethorpe shows one man artfully urinating into the mouth of another, expelling urine by force of the sphincters, so to speak (or so to express). In another of his photographs he also shows a bullwhip thrust handle-first into a man's anus. As a *Washington Post* writer explained, Mapplethorpe "set out to celebrate this domain of sexual experience, to elevate it, even to a transcendent level."[3] It was their failure to appreciate this higher purpose that caused the *Post* to be indignant with Jesse Helms and his "yahoo" colleagues in the Congress who threatened to cut off funding. Expression, the *Post* insisted, even apparently shocking expression, is protected by the First Amendment. (In its own expression of indignation, the *Post* reproduced a Mapplethorpe photograph of a couple of tulips and, a week or so later, a Mapplethorpe self-portrait of his face, but for some

reason, it never got around to reproducing what the art critic Hilton Kramer, writing in the *New York Times*, referred to as "those disputed pictures.")[4]

In fact, of course, the First Amendment protects not freedom of expression, but freedom of speech. "Congress shall make no law," it reads, "abridging the freedom of speech." But, it might be asked, what is expression if not one of the forms of speech? Indeed, to refer again to the dictionary, the word soon acquired the meaning familiar to us, "the utterance of feelings." Besides, in our postmodernist world, speech and expression are easily confused and just as easily identified. In his massive and widely acclaimed book, *The System of Freedom of Expression*, for example, Thomas I. Emerson of the Yale Law School, no doubt inadvertently, removed the word "speech" from the First Amendment and put in its place the word "expression." In construing specific legal doctrines that govern concrete issues, he wrote, "The main function of the courts is . . . to define the key elements in the First Amendment: 'expression,' 'abridge,' and 'law.'"[5]

It would be foolish, however, to insist on this distinction between speech and expression when confronting the issue of censorship of the arts. Whatever the authors of the First Amendment intended by choosing the word "speech," there are sound practical reasons for the law to leave the arts alone. Even assuming that not everything carrying the label is, in fact, art, the courts are unable, and have proved themselves unable, to make the aesthetic judgments necessary to mark the distinction. And since the kind of restrictions proposed by Jesse Helms would inevitably end up in the courts, it would be best to forget about dealing with the problem through legislation.[6]

Thus, for example, Helms, like the legendary Anthony Comstock, would have drawn the line between art and obscenity, but many a work of art, and many a literary masterpiece, is obscene. Aristophanes's *Assembly of Women* is so obscene that the English translator of the play preferred to remain anonymous. (That was a long time ago.) Hilton Kramer finds it noteworthy that Manet's painting, *Le Déjeuner sur l'herbe*, now one of the Louvre's "treasured classics," was considered indecent when first exhibited in 1863. Treasured classic or not, it is indecent; no one, however, not even Jesse Helms, I suspect, would say that about the painting that inspired it, Giorgione's *Concert Champêtre*. The two paintings—each of them a masterpiece—are both strikingly similar and dissimilar, but what distinguishes them cannot, I think, be expressed in any category known to the law.

Manet, the greatest of the French Impressionists, shows a woman without a stitch of clothes on, and in the background another partially clothed woman, the two of them sharing a picnic lunch with two fully clothed men. Giorgione, some 350 years earlier, shows two women, without a stitch of clothes on, also in the company of two men who are fully clothed. But Manet's women are undressed; he shows their clothes in a heap. Giorgione's are simply nude; their clothes are nowhere to be seen. Manet's women are playful, even wanton, as if it is no big deal, as we would say, for women to undress before men in a public park. Giorgione's women appear serene, even noble; one of them is holding a pitcher and pouring water from it *into* a well. Manet's men look bored; sharing a picnic lunch with undressed women would appear to be something they do every day. Giorgione's men are innocent and appear to be engaged in serious musical conversation. Nothing indecent is being depicted here; as is evident to someone who knows how to look at it, the young men cannot see the women because the women, like Oberon in Shakespeare's *A Midsummer Night's Dream*, are invisible, not to us but to them. The women are not human; they are woodland nymphs who, attracted by the music and charm of the young men, have joined in their pastoral concert, their *Concert Champêtre*.

There is no reason to believe that a judge cannot be taught to see this—I myself learned it from an art critic, Philipp Fehl—but there is also no reason to believe that a judge could state the difference between the two paintings (or, more to the point, between Manet and Mapplethorpe) in a rule of law. When required to make such distinctions, judges are inclined to mutter something about "redeeming social value" (and find it in *Fanny Hill*, the highly explicit life story of a whore), or to throw up their hands and say, with the late Justice John Marshall Harlan, "One man's vulgarity is another's lyric."[7] This was said in 1971 for a divided Supreme Court, but it is a foolish statement at best and, at worst, it is pernicious. For if Harlan is right, there is no such thing as vulgarity (and therefore no reason to censor); but, by the same token, there is also no such thing as art (and therefore no reason not to censor).

Better, as I say, for the law to leave the arts alone. Better for society to express its disapproval of a Robert Mapplethorpe by simply refusing to fund his work. Presumably—although, goodness knows, there is reason to doubt it—the National Endowment for the Arts, unlike the courts, can do this

without a Helms amendment and without jeopardizing the work of Giorgione or Manet.

Political expression is another matter, but unfortunately, our judges hardly do much better in that area. In the Skokie case, the Illinois Supreme Court even quoted Harlan's aphorism, thereby implying that what went for the brandishing of four-letter words in a courthouse (the issue in Harlan's case) applied equally well to an invasion of Nazis brandishing their swastikas in a community of Holocaust survivors.[8]

This sort of moral relativism is a feature of our First Amendment law: Distinctions, whether between the art of the tulip and the art of the anus, or between flag-burning and sober political speech, are not to be made because, so it is thought, they cannot be made except arbitrarily. Just as beauty is in the eye of the beholder, so truth is relative, a proposition that found its way into our law through the good offices of two of our most famous twentieth-century Supreme Court justices, Oliver Wendell Holmes and Hugo L. Black. If, said Holmes in 1925, "the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[9] So, too, Black in 1961: "Education and contrary argument [may provide an adequate defense against Communist and fascist speech, but if that] remedy is not sufficient, the only meaning of free speech must be that the revolutionary ideas will be allowed to prevail."[10] In other words, it is worse to punish the advocacy of Stalinism or Hitlerism than it is to be ruled by Stalin or Hitler.

According to the historian Arthur M. Schlesinger Jr., relativism is the peculiar American virtue; everyone we admire—not only Holmes, but Learned Hand, Ralph Waldo Emerson, William James, Reinhold Niebuhr, even (astonishingly enough) Abraham Lincoln—in fact, everyone except Allan Bloom and, presumably, the "yahoos" represented by the "unspeakable Jesse Helms"—was or is a relativist. Relativism, Schlesinger says, "is what America is all about."[11]

It was, of course, otherwise at our beginning. John Locke was the first to teach us the importance, not of speech—Aristotle did that—but of freedom of speech, by which he meant freedom of religious speech, or liberty of conscience. Locke, writing in the seventeenth century, aimed this doctrine at the clergy (for example, the Archbishop of Canterbury, William

Laud) who, with the support of the government (for example, King Charles I), used *their* speech to instruct people in the proper care of their souls and threatened to punish anyone who disobeyed. The consequence, especially in Locke's own time, was civil war and revolution. Locke taught, and succeeded in teaching Thomas Jefferson and the other American Founders, that "the care of each man's soul belongs unto himself alone," and that "liberty of conscience is every man's natural right." Government is instituted to secure that right, which means, so far as government is concerned, that there is no right way to care for souls and that all religious speech is equal. As Jefferson put it, "It does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg." In fact, he added, "difference of opinion is advantageous in religion."[12]

Freedom of speech may be advantageous in religion and, as Jefferson said elsewhere, harmless in physics and geometry; but he never said that, nor anything resembling it, with respect to political speech. On that subject, and unlike Schlesinger, he and the other Founders were not relativists. As they saw it, we might lack knowledge concerning the right way to care for souls, but we had firm knowledge concerning the fundamental principles of government: We knew that governments were instituted to secure rights, and that they derived their just powers from the consent of the governed. If this were a matter on which men might rightly disagree, it would be impossible to protect the right of freedom of conscience. For then the opinion that government must instruct men on the care of their souls would be equal to the opinion that the care of each man's soul belongs to himself alone, and the issue could not be decided (and, in the Britain of Locke's time, was not decided) other than by force of arms.

Thus, at our beginning, there was understood to be a difference between religious and other kinds of speech, which is why the First Amendment distinguishes them. With respect to religion, we were to be a house divided, and the Constitution was designed to keep us divided. With respect to the fundamental principles of government, we were to be a house united, and the Constitution was designed to keep us united: "The United States shall guarantee to every State in this Union a Republican Form of Government" (article 4, section 4).

Fulfilling this mandate is not an easy matter. Republican government is representative government, but, in the words of James Madison in

Federalist 10, the people to be represented are by no means unified; in fact, they are divided into "factions," the causes of which are "sown in the nature of man." By nature, men are selfish, each of them moved by "self-love"; and while they are endowed by nature with the same rights, they are also endowed by nature with different and unequal faculties. The consequence is that they have different interests. Republican government must bring these naturally self-interested persons together to form a whole while also respecting the diversity of their interests and, at the same time, securing their right to have different interests. Not, to repeat, an easy thing to do. The Founders' solution was representative government based on the consent of the people. Such a government must, first of all, represent the diversity of interests in the society. Therefore, the First Amendment guarantees that each person has a voice in the selection of the representatives who make the laws and form the policy. Stated otherwise, each member of the society registers his consent by debating, organizing, and then choosing his representatives. Freedom of speech plays an essential part in this process.

Secondly, such a government must make it possible for agreements to be reached with respect to the policies adopted in the laws and otherwise pursued. To do this, it must gain the consent of these representatives, or at least a majority of them, each of whom has a right to withhold it. This, too, requires speech, but speech of a certain kind, which is why every representative assembly has rules governing the manner of debate. Kings may speak haughtily and tyrants cruelly, insultingly, or even contemptuously, but the members of a republican assembly must adopt a mode of address that reflects a disposition to respect the interests of others because, as a matter of constitutional right, they are equally respectable. The speech of political representatives will be self-interested speech, of course, but it will be speech that recognizes the difference between self-interest and the common interest and the necessity to agree on a common interest. And given the fact that men are divided by their interests (which derive from their self-love and different faculties), the common interest here takes the form of an aggregation of partially satisfied self-interests.

Gregory Johnson wanted no part of this. On the contrary, he had nothing but contempt for the flag and "the republic for which it stands." To adopt the locution of the day, he was "into" self-expression, and as Harvard's Harvey Mansfield has reminded us, there is nothing in self-expression that

requires or encourages one "self" to seek the consent of the other.[13] Self-expression is almost always angry expression, and anger provokes anger, as it did in this instance, not agreement or accommodation.

The reason self-expression is almost always angry is that it is self-assertion. According to Nietzsche (the founding father of self-expression and the man from whom all this derives), the "self" lacks innate definition; it acquires identity, or "authenticity," only by assertion against others.[14]

In this sense, the "self" is a neologism; we speak of "selfs" where our fathers, or at least our Founding Fathers, spoke of souls, and the difference is decisive. "The soul may be responsible for its being good or bad," as Leo Strauss wrote a number of years ago when addressing a somewhat similar issue, "but it is not responsible for its being a soul."[15] Rather, the soul is (or was) understood to be part of an order for which God was responsible. But in Nietzsche's words, "God is dead," and with his death went the ordered universe of which the soul was a part. "Nature's God," the God of the Declaration of Independence, is also dead, and with his death went the laws and rights of nature, because, lacking definition, the "self" is governed by no moral laws and is incapable of having rights.

This means that constitutionalism is also dead, an event announced by Sanford J. Levinson of the University of Texas Law School. "The death of 'constitutionalism,'" he declares, "may be the central event of our time, just as the death of God was that of the past century (and for much the same reason)."[16] Nature's God endowed us with rights and the Founders provided us with a Constitution that, in order to secure these rights, put constraints on the popular will. With His death, those constraints are deprived of all moral authority. In Levinson's words, "law is stripped of any moral anchoring," with the consequence that there is nothing "to which the will [is] bound to submit."[17] No moral order, no moral laws, and, as Nietzsche said, no reason to be burdened by guilt.

The "self" exists in this void; it is merely will; it becomes what it is only by asserting—in Nietzsche's formulation—"the will to power," and the strongest will must prevail. This prospect does not frighten Levinson: "Political institutions," he says, "thus become the forum for the triumph of the will," the phrase first uttered by Hitler's minister of propaganda, Joseph Goebbels, and rendered memorable (appallingly so, one would have thought) by Hitler's favorite filmmaker, Leni Riefenstahl, in *The Triumph of*

the Will. When it comes to "self-expression," no one has yet been able to top Adolf Hitler. On the other hand, considering the condition of our legal and political thought—Levinson claims his view of our situation is held by "most major law schools"—there is no guarantee that someone might not yet succeed in doing so.

All this should serve to convince us that the Supreme Court was ill-advised to treat flag-burning as unimportant. The flag is the symbol of what we think about ourselves and what we think we are about, much more so than the presidential seal, to adopt Justice William Brennan's silly analogy. As Judge Robert Bork said after reading Brennan's opinion for the Court in this case, no one, save perhaps the members of the White House staff, salutes the presidential seal.[18] Nor, unlike the case with the flag, does the *United States Code* devote page after page prescribing when and where it should be displayed—"The flag should be displayed during school days in or near every schoolhouse"—or how it should be displayed, or how it should be folded and disposed of, or how and when it should be saluted.[19] Nor, again unlike the case with the flag, does the code make it a federal offense to "desecrate" the presidential seal. Like the American people, Congress has always looked upon the flag as something special. Why, then, is the Supreme Court unable to draw a line in favor of the flag and against its desecration?

The Court's answer is that the First Amendment forbids the drawing of such a line. Writing for the five-judge majority, Brennan said that "if there is a bedrock principle underlying the First Amendment, it's that the government may not prohibit the expression of an idea simply because it finds the idea itself offensive or disagreeable."[20] But surely it is possible to distinguish between an idea and the manner in which it is expressed. Judges may not be able to devise a rule of law marking the difference between Manet and Mapplethorpe, but it is not beyond their capacity as jurists to distinguish between speech and at least some forms of expression or, for that matter, among the various kinds of speech. Libelous speech is not protected by the First Amendment, nor are "fighting words," perjury, false advertising, verbal agreements to restrain trade, vulgar speech in a student assembly, or contemptuous speech in a courtroom. The list is not endless but it is long, and commodious enough to include flag-burning.

Within these limits, Gregory Johnson could say whatever he wanted to say; that is the "bedrock principle." He could, with impunity, denounce

Ronald Reagan and George Bush and call down a plague on the Republican Party; he could hurl his imprecations against the United States and the American people; he could scream his disgust with life in the twentieth century. He could also make a fool of himself by burning the presidential seal—no law forbids it—but he should not have been permitted to do whatever he wanted to do by way of expressing his "self."

Of course, deprived now of flag-burning—because it is no longer illegal—Johnson and his friends would have to find new and, of necessity, more egregious ways to aggress against the symbols, the conventions, or the mores which, as Tocqueville argued, provide the foundation of America's laws and its political life. For this they might have found inspiration in some of Robert Mapplethorpe's photographs, which may explain why Johnson immediately flew to Washington in order to be among the first to visit the private gallery exhibiting them.

13

Blue Movies

Hollywood Censored, we are told on the book's dust jacket, "examines how hundreds of films—Mae West comedies, serious dramas, and films with a social message—were censored and often edited to promote a conservative political agenda during the golden age of studio production in the 1930s."[1] It goes on to explain how, because of a series of sex scandals that took place in Hollywood in 1922, Will Hays was hired by the movie industry to clean up its image. Hays's solution was to adopt what came to be known as "the Production Code." Written by a St. Louis priest and a Catholic layman, it "stipulated that movies stress proper behavior, respect for government, and 'Christian values'—thereby challenging the moguls' staunch belief that movies entertain, not preach morality." The dust jacket continues:

> The Catholic Church further reinforced these efforts by launching its Legion of Decency in 1934. Intended to force Hays and Hollywood to censor movies more rigorously, the legion engineered the appointment of Joseph Breen as head of the Production Code Administration. For the next three decades, Breen, Hays, and the Catholic Legion of Decency virtually controlled the content of all Hollywood films.

In addition to this accurate summary of the book, the dust jacket also points out that its author, Gregory D. Black, is a professor, which, without more, is enough to assure opponents of censorship that the subject will be treated in the manner they have come to expect. The censors are depicted as knaves—or, with good reason in the case of Joseph Breen, anti-Semitic bigots—and the filmmakers as fools interested only in making money. But, since advertising is a good way of promoting a film, and therefore of making money,

one of the surest (as well as the cheapest) ways of advertising may be to resist, or pretend to resist, the strictures of the censors. This was proved in the case of *Klondike Annie*, starring the ludicrous Mae West; the attempts to ban it, Professor Black reports, "caused a flood of eager customers to storm box offices across the country."[2] Maybe the filmmakers weren't so dumb after all.

Black says the filmmakers during the "Golden Age" of studio production "worshiped revenue more than they respected honesty," and would have us believe that they would have made better films (presumably, films like those now being made) had they been honest.[3] Yet among the films that were made by these "dishonest" producers, which he does not so much as mention, were *Casablanca*, *The Maltese Falcon*, *Philadelphia Story*, *Mutiny on the Bounty*, *Top Hat*, *High Noon*, *Shane*, *Brief Encounter*, *The Lady Vanishes*, and (when the censors were dozing) *Le Diable au Corps*, starring Micheline Presle and the young Gerard Philipe. But Professor Black's concern is with the films that might have been made but were not, and "how different those films that were made might have looked," had they not been censored.[4]

With this in mind, he makes much of the censoring of *Anna Karenina*. He says:

> Breen realized that the industry would look foolish if it banned Tolstoy and other pieces of classic literature simply because they contained sexual themes [but he also knew that] any reasonably accurate film of Tolstoy's novel was sure to invoke howls of protest from [the Legion of Decency].[5]

In the earlier (1927) screening of the novel, MGM gave exhibitors a choice of endings by releasing two versions, one, true to the novel, in which Anna commits suicide, and the other, in which she and Count Vronsky are reunited and, presumably, live happily ever after. But, Professor Black points out, "Audiences in 1935 would have no such choice: The Anna of the Breen era would be thoroughly chastised and fatally punished for her sinful transgressions against family, church, and state."[6]

But Breen was not the fool (or not quite the fool) he is made to seem. Sure, Anna was in love, and love is a wonderful thing, but by committing adultery, abandoning her child, and running off with Vronsky, she did transgress against family, church, and state; and sure, Karenin (Professor

Black calls him "Karenina") was a clod, but he was Anna's lawfully wedded husband and father of her child, and that used to count for something. But, whatever Breen's reasons for insisting on it, Tolstoy knew that a happy ending would have made the novel pointless. Besides, how is the author of a love story going to depict the power of love except by putting it in competition with something equally compelling?

Professor Black wonders what an uncensored *Anna Karenina* would have looked like. The answer is, probably much as it would look if it were made today. Anna (Sharon Stone?) would casually pack her bags, dash off (or perhaps not bother to dash off) a short note to Karenin and, with Vronsky (Michael Douglas) at her side, catch the train to Portofino where, against a background of the blue Mediterranean, the two of them pull off their clothes, hop happily into the sack, and (she moaning and he grunting) commence their revels. But, with nothing at risk and nothing to suffer—when sex is "no big deal"—who could believe that this Anna was really in love?

The point escapes Professor Black, but the real fools in this business were those who thought it possible to produce a film of Tolstoy's novel for an audience for which drama is only a form of recreation. Such an audience simply wants to be entertained without having to wonder what it is that makes Vronsky a foolish but interesting man and Anna (but not the carelessly adulterous Betsy Tverskoy) an interesting woman, a woman under the sway of conflicting passions: romantic love and devotion to child, eros and duty, promise and necessity. Tolstoy could depict all this in the written word, and there was a time when, even in bourgeois and democratic America, he was read by a handful of us. But, given their cost, films—movies, as we say—are made for a larger and less patient audience. As Tocqueville said in a chapter devoted to the drama in a democratic age, "The great authors of a preceding age may be read, but pieces written for a different public will not attract an audience."[7]

What, then, will attract a democratic audience? Tocqueville anticipated the problem when he said, "There are no dramatic subjects in a country which has witnessed no great political catastrophes and in which love invariably leads by a straight and narrow road to matrimony," to which he added, "People who spend every day in the week making money, and Sunday in going to church, have nothing to invite the Muse of Comedy."[8] He suggested, but only in passing, that democratic dramatists would meet

this problem by making their productions "more striking, more vulgar, and more true [to democratic experience]," but, considering his prescience, it is strange that he did not anticipate our apparently insatiable appetite for violence and pornography, and, once the censors were put out to pasture, that our dramatists would supply us with a steady stream of it.

That doesn't bother Professor Black. In one place, he suggests that it might make sense to take account of the susceptibility of children by rating some films "unobjectionable for adults." Under this sort of rating system, he says, it would be up to parents to decide whether "youngsters could attend [such] films."[9] But what gives him confidence that parents will be able to make these decisions, or, having made them, be able to enforce them? In our day, when the law is forbidden to make moral judgments—this because the Supreme Court effectively put the censors out of business some twenty-five or thirty years ago—and when, especially in the public schools, students are told that the only self-evident truth is that there is no such thing as truth, and, therefore, that all moral judgments are "relative," our parents will be on their own. In this situation, a dialogue between a father and his teenage son would be likely to go something like this:

> Father: "Your mother and I are going off for the weekend, and we don't want you watching any X-rated videos while we're away."
>
> Son: "Why not? You and Mommy do."
>
> Father: "Well, yes, but they're for adults only. Look at the label."
>
> Son: "But if they're okay for you and Mommy, why can't me and my girlfriend watch them?"
>
> Father: "Well . . . well, because I said so, that's why."
>
> Son: (but *sotto voce*) "Up yours."

Farfetched? Perhaps, but to paraphrase a line from Allan Bloom's *The Closing of the American Mind*, when no one else is seriously concerned with it, parents will lose control over their children's moral education.[10]

The film-rating system has been likened to the warning on cigarette packages, but the analogy is faulty. The latter tells us that cigarettes are bad for children and bad for adults; the former tells us that sex and violence are bad for children but okay for adults, perhaps even good for adults, something children can look forward to when they are "grown up," as we say.

But why should our teenage son have to wait until he is an adult? Unlike his father, he may not yet be capable of earning a living or caring for a family, but, like his father, he is perfectly capable of enjoying an X-rated film. The only reason to deprive him of this pleasure is that, by doing so, he might be prevented from becoming like his father, and this might be done only by declaring that obscenity and pornography (like cigarettes) are bad for father and son alike. This is why the censors preferred the Motion Picture Production Code to a rating system.

According to the code—I'm quoting the 1956 revision—"No picture shall be produced which will lower the moral standards of those who see it." Its specific provisions included the following (and how quaint they seem today!):

> Excessive and inhumane acts of cruelty and brutality shall not be presented. This includes all detailed and protracted presentations of physical violence, torture and abuse. . . . The sanctity of the institution of marriage and the home shall be upheld. No film shall infer that casual or promiscuous sex relationships are the accepted or common thing. . . . Lustful . . . kissing and embraces, suggestive postures and gestures are not to be shown. . . . Complete nudity, in fact, or in silhouette, is never permitted, nor shall there be any licentious notice by characters in the film of suggested nudity.[11]

The prohibitions of the 1950s (and before) have become the standard fare of the present day; the people like it and, with their custom, show their approval of it. With us, as Jean-Jacques Rousseau would have said, vice has taken on the likeness of decency. (What he did say is this: "Vice hardly insinuates itself by shocking decency but by taking on its likeness.")[12]

Does it matter? Some people (typically parents) think so, and occasionally call upon Congress to do something. Before her husband became vice

president—in fact, in 1988, before he campaigned for the presidency—even Tipper Gore thought so; see her *Raising PG Kids in an X-Rated Society*.[13] But anyone who believes that the prohibitions might be reimposed today should ponder another of Rousseau's aphorisms: "Censorship can be useful for preserving morals, but never for reestablishing them."[14] As we say, that dog won't hunt.

14

Hail, New Columbia

"No taxation without representation" is a venerable principle. In December 1753, it inspired what we remember as the Boston Tea Party, then, in short order, the Revolution and the nation born in 1776. Surely, one might think, the Constitution of this nation would recognize the claims of the taxpayers resident in its capital city. Are they not, like the residents of the various states, entitled to be represented?

Admittedly, they are not altogether unrepresented now. The District of Columbia has elected city government—mayor, city council, and the rest—and, under the Twenty-third Amendment, its residents are fully represented in the electoral college. But in the national Congress they have, at best, a "virtual" representation—two "shadow senators" and a single "delegate" in the House of Representatives—even though they outnumber the residents of the states of Alaska, Delaware, and Vermont (to say nothing of Wyoming). This situation might be amended only by amending the Constitution, and, as the District's residents were to learn, this is not easily done.

In 1978, an amendment was proposed providing that, "for purposes of representation in Congress . . . the District constituting the seat of government of the United States shall be treated as though it were a State."[1] The amendment bill was approved by the required two-thirds vote in both House and Senate and sent on to the states for their ratification, with the stipulation that this be done within seven years. As it happened, however, only sixteen of the required thirty-eight states ratified the proposed amendment.

Partisan reasons had much to do with this outcome. The Republicans could not have been pleased with the proposal, and while they are as scarce as hens' teeth in the District—in the presidential election of 2004, for example, over 90 percent of the District voters favored the Democrat John Kerry—they are well represented in the various state legislatures. And they had good

reason to believe that the adoption of the amendment would give the Democrats two more senators and two or three more members of the House.

But aside from these partisan considerations, the amendment may have failed because it was itself, or was said to be, a violation of the Constitution, specifically, of the clause in article 5 which provides that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." This means, or is said to mean, that only states may be represented in the Senate.

I confess that I myself made this argument in testimony before the relevant committee of the House of Representatives. Briefly stated, the argument is that states are (as they originally were) manifestly *un*equal in wealth, industry, husbandry, virtue and vice, flora and fauna, and, most significantly, size of population. This inequality of states—"their respective numbers"—is duly recognized in the House of Representatives. In what respect are they equal? What is it that entitles them to equal representation in the Senate? The answer is clear: They are equal in their "stateness," a quality not possessed by the District of Columbia. Accordingly, the District may be represented in the Senate only if it is made a state.

The time allotted for ratification of the representation amendment expired in 1985, and, immediately on its expiration, a bill was introduced in Congress proposing another amendment to the Constitution, this one making the District a state, to be called New Columbia. It, too, failed of adoption; in fact, no action was taken on the bill. But there were plans to try again in the new Congress, and, if necessary, the Congress after that.

Who would oppose it? Not the District's residents, a majority of whom gave it their support in a special referendum. Not the city council, which was eager to become a state legislature and, to that end, had declared its readiness to write the required republican constitution. Not the Democrats, in or out of Congress, and not, in his time, President Bill Clinton; he may have kept his daughter out of the District's schools, but he supported its bid for statehood. All those foreign embassies located in the District might have preferred things to remain as they were, but, presumably, the grounds they occupy would, under the laws of New Columbia, retain the same status they then enjoyed under the laws of the United States. So why should they object? This leaves the Republicans. But who among them was likely to say publicly what Senator Edward Kennedy accused some of them of saying privately, namely, that the District is "too liberal, too urban, too black, and

too Democratic"? The answer seemed clear: If Alaska, in addition to being too cold, might be said to be too rural, too white (leaving out the Eskimos), and too Republican, why not New Columbia?

Strangely enough, however, the Twenty-third Amendment stands as an obstacle to statehood and will have to be repealed. Until it is, "the District constituting the seat of Government of the United States" will continue to be entitled to three electoral votes, but it will be much reduced in size, so reduced that the number of its residents may not exceed the number of electoral votes. Given the name National Capital Service Area, the new "seat of Government of the United States" will comprise that part of the present District which lies outside the boundaries of the state of New Columbia.

The statehood bill devoted seven pages to defining those boundaries:

> Beginning at the point on the present Virginia-District of Columbia boundary due west of the northernmost point of Theodore Roosevelt Island and running due east of the eastern shore of the Potomac River; thence generally south along the shore at the mean high water mark to the northwest corner of the Kennedy Center; thence east along the north side of the Kennedy Center to a point where it reaches the E Street Expressway; thence east on the expressway to E Street Northwest and thence east on E Street Northwest to Eighteenth Street Northwest . . .[2]

The area thus defined comprises the White House (and Lafayette Square), the District Building (which will give New Columbia the dubious distinction of being the only state whose capitol is located outside its boundaries), the Mall, the Capitol, the Supreme Court, the Library of Congress (except the Annex), and most of the major federal office buildings (but not that part of the Department of Labor building which lies to the west of "Third Street Northwest").

Who lives in this shrunken District? Or, to speak more formally, who are the residents of this National Capital Service Area? George, Laura, and intermittently, Jenna and Barbara Bush, and, stretching the definition of resident, a handful of the itinerant homeless. And who will cast its electoral votes? Since the president is ineligible to serve as an elector—he holds an

"Office of Trust or Profit under the United States"—the three electoral votes will have to be cast by other District residents.[3] Whoever they are—Bushes or homeless—they will have as much power in the choice of a president as the voters in each of seven of the states. While not unconstitutional, this is surely not what the Supreme Court had in mind when it announced the one-man, one-vote rule.

As I said, the Twenty-third Amendment is an obstacle to statehood and would have to be repealed; it is a formidable obstacle because the repealing amendment, like the statehood amendment itself, would require the consent of three-fourths of the states. And that consent is not likely to be forthcoming. In fact, since 1789 and the adoption of the ten amendments comprising the Bill of Rights, only seventeen proposed amendments have won the support of three-fourths of the states.

The only certain way for residents of the District to gain representation in the Congress is to return the District of Columbia to the state of Maryland whence it came. There is precedent for this; that part of the District lying on the west bank of the Potomac was ceded to the federal government by Virginia in 1790 and "retroceded" to it by act of Congress in 1846. Retrocession of the Maryland portion would give the residents of the District all the rights and privileges enjoyed by citizens of Maryland, including representation in the state legislature, and Maryland would gain at least one more member of the federal House of Representatives.

For some reason, and despite the many attractive qualities the District is said to possess, Maryland seems to want no part of it. Perhaps Baltimore, the state's largest and, in many ways, its favored city, sees its position threatened by the absorption of Washington. Or perhaps, with Baltimore, its representatives believe the state has all the problems it can handle.

15

Teaching Patriotism

Back in 1776, Tom Paine said that commerce "diminishes" the spirit of patriotism, and we are the most commercial of peoples. Yet we are also one of the most patriotic; every public opinion survey shows this to be a fact. Not only that, but our patriotism is anything but selfish or parochial; Lincoln had this in mind when he said that we were "the last, best hope of earth." This was true in 1862 when he said it, and it is more obviously true today. Like it or not (and it is something of a burden), our lot is to be the one essential country—the one country with the power to defend liberal democracy against its enemies—and this ought to be acknowledged, beginning in our schools and universities, for it is only then that we can come to accept the responsibilities attending it. We owe it to our friends, as well as to ourselves, to be patriotic.

The word itself comes from the Latin *patria*, meaning country, and patriotism implies a love of country and a readiness to sacrifice for it, perhaps even to give one's life for it. This was well understood in the countries (or cities) of classical antiquity, especially in Sparta, where the words "citizen" and "patriot" were essentially synonymous. Thus, in the Spartan sense, patriots are citizens who love their country simply because it is their country—because it is "their birthplace and the mansion of their fathers," as Alexis de Tocqueville puts it in his famous *Democracy in America.*[1] Citizenship and patriotism were one and the same in Sparta; it was a kind of filial piety. But America is no Sparta.

Spartans were a homogeneous people, descended from the same ancestors, few in number, and inhabiting an area smaller than the District of Columbia. But we are many, not few—even in our beginning our numbers were many times those of Sparta—and we are no longer, if we ever were, a people descended from the same ancestors. In principle, whereas no

stranger could become a Spartan, anybody can become an American, and millions of people from around the world have done so; this helps to explain why that patriotic word "fatherland" has no place in our vocabulary. Unlike Sparta in so many respects, we are, nevertheless, alike in our need of citizens who love this country and are willing to fight for it.

Citizenship for us has, first of all, a legal meaning. According to section 1 of the Fourteenth Amendment of the Constitution, a citizen is any person "born or naturalized in the United States, and subject to the jurisdiction thereof." But citizenship is, or is supposed to be, more than legal status and the enjoyment of the "privileges or immunities" attached thereto; in its larger sense, it is a sentiment or state of mind, an awareness of sharing an identity with others to whom one is related by nationality, if not by blood, a sense of belonging to a community for which one bears some responsibility. In a word, citizenship implies public-spiritedness, which is akin to patriotism, and has to be cultivated.

Both have to be cultivated because no one is born loving his country; such love is not natural, but has to be somehow taught or acquired. A person may not even be born loving himself—the authorities differ on this—but he soon enough learns to do so, and, unless something is done about it, he will continue to do so, and in a manner that makes a concern for country or fellow countrymen—or anyone other than himself—difficult or impossible to have. The problem is as old as politics, and no country is exempt from having to deal with it, but, for reasons having to do with our democratic principles, it could be especially difficult for us. To paraphrase a line from Abraham Lincoln's 1862 message to Congress, our case was new, so we had to think and act anew.

According to the motto inscribed on the Great Seal of the United States (and reproduced on every dollar bill), we are a *novus ordo seclorum*, which is to say, a new order of the ages. We were the first nation to declare our independence by appealing not to the past but to the newly discovered "Laws of Nature and of Nature's God," and this had (and has) consequences for patriotism. Whereas the God of Abraham, Isaac, and Jacob imposed duties on men (see Exodus 20:1–17), "Nature's God" endowed all men with rights, private rights; and, whereas the God of the Bible commanded all men to love God and their neighbors as themselves (see, for example, Matthew 22:37–40), "Nature's God" created a state of nature in which

everyone was expected to take care of himself and, as John Locke said, take care of others only "when his own preservation comes not in competition."[2] And so long as he remains in the state of nature, he has the right to do what he is naturally inclined to do, and what he is naturally inclined to do is not to take care of others. To say the least, he is not naturally inclined to be a patriotic citizen.

It is, of course, true that a person is required to surrender his natural rights when leaving the state of nature—except the few unalienable ones, the surrender of which would contradict the very purpose of the flight from nature—but in exchange, as it were, he gains the security that only government can provide. For example, the Constitution makes it clear that he cannot be deprived of life, liberty, or property without "due process of law." As John Jay says in *Federalist* 2, "Nothing is more certain than the indispensable necessity of government, and it is equally undeniable that whenever and however it is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers." Nevertheless, it remains true with us that rights are primary and duties are secondary and derivative. Designing a public-spirit curriculum for such a people is no easy task. Yet, according to the public opinion surveys, we are one of the most patriotic of peoples, more patriotic than the British, for example, or the Canadians, Swedes, Norwegians, Germans, Dutch, and Czechs, to say nothing of the French.[3] What accounts for this?

In *Making Patriots*, I wrote that the connection between war and patriotism, or better, between war and the making of patriots, is evident, perhaps even self-evident. I was speaking there of the Athenians and Spartans at the time of the Peloponnesian War, but, of course, I was thinking not only of them or of that time. The book itself is about making American patriots, or making patriots of Americans, and it was to be expected that I should be asked repeatedly—at a book forum, on radio and television, and privately by friends—whether I thought a war was required to make us patriots.

My answer then was a qualified no, but only so long as we remember past wars. To help us remember, we have a Memorial Day (Decoration Day, when I was young), a Flag Day, and the Lincoln, Vietnam, Korean, and World War II memorials. To the same end, we have national cemeteries filled with the graves of patriots, and a national anthem composed during, and reminding

us of, a long-past war. This nation was born in an earlier war, and Abraham Lincoln referred to the men who fought it as "the patriots of seventy-six."[4] Born British subjects, and living in thirteen separate British colonies, we became "one people" in 1776; we said so in our Declaration of Independence. We were made one because George III and our erstwhile British brethren were "deaf to the voice of justice and of consanguinity."

What the British did to rally American patriotism in 1776, the terrorists did on September 11, 2001. The signs of this are everywhere. It was only a few years ago that a divided Supreme Court held that Americans were entitled to burn the flag, that they had a constitutional right to do so. But no one is burning the flag these days (probably because it is no longer illegal to do so). Instead, millions of Americans are flying it, from their front porches and balconies, on their automobiles and the antennas of battered pickup trucks, even wearing it on their lapels. Flying the flag—the people seemed to know this intuitively—is the readiest way to demonstrate their love of country, and their pride in being Americans.

Not only that but, told it was in short supply, they rushed to give their blood, and to the scene of devastation in New York with food, blankets, masks of some sort, whatever they thought was needed. They grieved for those who had lost their lives, and some of them prayed for the bereaved left behind: the heroic police and firemen, and, especially, because it was not their job to do so, those passengers on United Airlines Flight 93 who gave their lives to prevent the plane from going on to Washington, there to destroy the White House or, worse, the citadel of our representative democracy, the Capitol on the hill. And for the relief of those left behind they donated prodigious sums. It was as if they remembered what the Apostle Paul said in his Epistle to the Romans, "We are members one of another."[5]

They had reason to believe this. The terrorists did not discriminate; they killed us all: black, white, and every shade between; rich and poor, investment bankers and blue-collar police and firemen; old and young; liberals and conservatives; Christian, Jew, Muslim, and "infidel"; some foreigners, as we soon learned, but all the others Americans, *unhyphenated* Americans—fellow citizens, if not personal friends or immediate neighbors.

There was no more talk of us and them, as in our usual political discourse; the only "them" were the terrorists. They surely did not intend it—and, I trust, will come to regret it—but by attacking us, intending to destroy

us, they launched an unprecedented swell of patriotic sentiment among us. There was nothing like it during the years of Korea, Vietnam, or the Gulf War, and, although old enough, I cannot remember anything like it after Pearl Harbor. Not then did crowds gather in the streets or at ballgames shouting, "USA, USA, USA!"

Not all of us feel this way. For no good reason, there are Americans—mostly professors and New York intellectuals—who are inclined to despise rather than to love this country. For evidence of this, we need only to read the press. Looking down from their own Mount Olympus, they say, and this is the least of what they say, that only the bourgeois and right-wing fanatics wave the flag. We might ignore this, except that it is said by persons held in high esteem by the general public, and whose opinions, therefore, carry weight. Andy Warhol once said that "nothing is more bourgeois than to be afraid to look bourgeois."[6] If so, if it is a bourgeois thing to wave the flag, this may explain why some Americans are—or were—embarrassed to wave it, or otherwise to express their love of this country. Whatever its cause, this inhibition was obviously removed by the events of September 11. It turned out that there is patriotism enough in this country, and the people only needed an occasion to express it.

There is no denying that patriotism can be a problem; it can be misguided or a blind nationalism. This is why Aristotle refused to number it among the virtues along with justice, friendship, and courage, for example. But our patriotism is neither misguided or blind, nor is it a Spartan my-country-right-or-wrong patriotism. Ours was best described by Lincoln in his eulogy on Henry Clay. Clay, he said, "loved his country partly because it was his own country, but mostly because it was a free country, and he burned with a zeal for its advancement, prosperity and glory, because he saw in such, the advancement, prosperity and glory, of human liberty, human right, and human nature."[7] The American patriot is devoted to his country, of course, but he is also devoted to universal principles respecting the rights of man.

The twofold character of American patriotism is evident in our Pledge of Allegiance. We pledge allegiance to "the flag of the United States of America, and to the Republic for which it stands." The republic, in turn, stands not only for our country but for those principles, the principles expressed by Henry Clay, and, before him, by "the patriots of seventy-six"—

namely, that all men, not just Americans, are endowed by their Creator with certain "unalienable Rights," and that government is instituted "to secure these rights." In 1776 we declared our right to form a new nation by appealing to these principles, and, because we were the first to do so, it fell to us to be their champion, first by setting an example—Lincoln was ever mindful of this—and subsequently by defending them against their latter-day enemies, the Nazis and fascists in World War II and the Communists in the Cold War. Like it or not, America is the one essential country, the model as well as the arsenal of democracy.

The terrorists understand this, which is why they hate us (especially us) and want to destroy us. Our existence is a threat to them precisely because it gives hope to the oppressed people of the wretched and undemocratic lands from which they come. They hate us because we are a free country, a country that guarantees freedom of speech, freedom of association, freedom of enterprise, and—the freedom that best distinguishes us from the countries harboring the terrorists—freedom of conscience. This country is, as Lincoln said it was, "the last, best hope of earth."

He said this in his annual message to Congress in December 1862. He said much the same thing, but this time with supporting argument, in August 1864, when speaking—extemporaneously—to an Ohio regiment being disbanded and returning home:

> I almost always feel inclined, when I happen to say anything to soldiers, to impress upon them in a few brief remarks the importance of success in this contest. It is not merely for to-day, but for all time to come that we should perpetuate for our children's children this great and free government, which we have enjoyed all our lives. I beg you to remember this, not merely for my sake, but for yours. I happen temporarily to occupy this big White House. I am a living witness that any one of your children may look to come here as my father's child did. It is in order that each of you may have through this free government which we have enjoyed, an open field and a fair chance for your industry, enterprise, and intelligence, that you may all have equal privileges in the race of life, with all its desirable human aspirations. It is for this [that] the struggle should be maintained, that we may not lose our

> birthright—not only for one, but for two or three years. The nation is worth fighting for, to secure such an inestimable jewel.[8]

When I was a schoolboy, we were expected to memorize Lincoln's words. Not those addressed to the soldiers, of course, but the 272 words of the Gettysburg Address, and the final paragraphs of his first and second inaugurals. And we had at least heard about his famous letter to Mrs. Bixby (which played a role in the recent film *Saving Private Ryan*), and we would have known what he was talking about when he referred to the "patriots of seventy-six." Our teachers—beginning in what grade, I cannot remember—thought it essential that we should be familiar with American history, and should respect, indeed honor, the men and women who made it, beginning with the Founders who declared our independence and wrote the Constitution.

Although it has been amended, formally as well as by judicial interpretation, the Constitution written in 1787 has ordered the affairs of this nation for more than two hundred years. We have become so accustomed to it that we might take its longevity for granted, but it is, in fact, remarkable, especially when compared with the experience of other peoples.

In a world where constitutions come and go with almost seasonal regularity, we have reason to wonder why ours has lasted so long, or to what we can attribute our good fortune. Various reasons account for it. In the first place, unlike France, we did not have to contend with a sullen nobility, dispossessed by a revolution of its property and privileges but not of its hopes to regain them. (Tocqueville had this in mind when he said that "the great advantage of the Americans is that they arrived at a state of democracy without having to endure a democratic revolution, and that they [were] born equal instead of becoming so.")[9] Then, unlike Poland, for example, we were not surrounded by powerful neighbors with hostile intentions; and we began, as John Jay said in *Federalist* 2, as a people speaking the same language (unlike Belgium), "professing the same religion" (unlike the former Yugoslavia), "attached to the same principles of government" (unlike France and Spain), and "very similar in their manners and customs" (unlike Canada). Jay exaggerated our unity, but his general point is valid. And, finally, we were more fortunate in our Founders. Many British colonies (to say nothing of others) have declared their independence since 1776—for

example, Nigeria, Egypt, and Canada—but none can boast of men like George Washington, Thomas Jefferson, John Adams, James Madison, Alexander Hamilton, Benjamin Franklin, James Wilson, and others too numerous to mention. Again, we were fortunate.

Before vaunting our success, however, we should acknowledge that we came close to failing. We prevailed, and continue to exist as a nation "conceived in Liberty, and dedicated to the proposition that all men are created equal," only because Lincoln, who spoke these words at Gettysburg, insisted that we fight and win the Civil War. It proved to be the deadliest of our wars, but it was also the most necessary; at stake was the meaning of the Declaration of Independence. Like Lincoln, the Confederates appealed to it, but they insisted that its principle respecting the natural equality of all men did not apply to black people; worse, given their reading of the Declaration, the Confederates had no alternative but to say blacks were not human beings. Thus, to allow the South to secede from the Union, and to recognize its *right* to secede, would render the principle meaningless. And other peoples, beginning with their rulers, would draw this conclusion.

Lincoln saved the Union, and as the best of his biographers (Lord Charnwood) says, "Nobody else could have done it." By saving it, many good things were made possible, not the least of them being the abolition of slavery. This was something the Founders were unable to do.

It has become the custom, especially in academic circles, to denounce the Founders as hypocrites, who spoke ill of slavery but did nothing to put an end to it. Yet, it should be noted that no form of the word "slave" appears in their Constitution; in each case the word employed is "person" or "persons." Frederick Douglass, the one-time slave (who became one of the great men of his generation) understood the significance of this perfectly. He held that the government established under the Constitution was, "in its essence," an anti-slavery government. "Abolish slavery tomorrow, and not a sentence or syllable of the Constitution need be altered," he said.

> It was purposely so framed as to give no claim, no sanction to the claim, of property in a man. If in its origin slavery had any relation to the government, it was only as the scaffolding to the magnificent structure, to be removed as soon as the building was completed.[10]

By "scaffolding," Douglass meant the three constitutional provisions addressed to the slavery question: the provision in article l, section 2, clause 3, whereby the southern states were allowed to count three of their five slaves for purposes of representation in the House of Representatives; the one in article l, section 9, allowing them, for twenty years, to import more slaves from abroad; and, finally, the one in article 4, section 2, clause 3, providing for the return of fugitive slaves. These concessions to slavery, demanded by the southern states, were the original price of union, and the Framers of the Constitution did indeed pay that price—and to this day have been criticized for doing so—but they paid it grudgingly, out of what they thought was necessity. Anyone who says the price was too high is obliged to argue that the lot of the slaves would have been better if the southern states had been allowed to form (as in 1860–61 they did form) their own pro-slavery confederation.

It has also become the custom, in some circles, to accuse the Founders of being sexists. But, again, the words of the Founders' Constitution lend no support for this charge. The terms used throughout the document are, in addition to "person" and "persons," "electors," "citizens," "members," "inhabitants," "officers," and "representatives." There are pronouns—"he," "his," "himself"—but, as my colleague Robert A. Goldwin has pointed out, "There is not a single noun or adjective that denotes sex."[11] Frederick Douglass pointed out that slavery could have been abolished without changing a word or syllable of the Constitution (and not a word had to be changed before Thurgood Marshall could be made a justice of the Supreme Court, or might have been elected president). So, too, not a word had to be changed before women could vote, and in some places did vote, even before the Nineteenth Amendment (which merely *protects* the right to vote); and not a word had to be changed before Sandra Day O'Connor could be made a justice of the Supreme Court, or might be elected president.

One other point about the Founders' Constitution: Its article 6, section 3, says that "no religious test shall ever be required as a qualification to any office or public trust under the United States." Anyone—Christian, Jew, Muslim, or infidel (and European, Chinese, Arab, Polynesian, or whatever)—provided he satisfies the age and nationality requirements, might become president. To borrow a phrase from the (Episcopal) Book of Common Prayer, America is a haven "for all sorts and conditions of men" (and women), all

of them with a right to pursue happiness as they themselves define it. No other country in 1776 could have made that claim, and very few (and none of our enemies) can make it now.

I devoted chapters of my book *Making Patriots* to the education that schoolchildren used to receive, to Lincoln, the greatest of our teachers, and to his colleague in the greatest of our struggles, Frederick Douglass. My purpose was to remind my readers that this country deserves citizens who love and honor it, and are prepared to defend it.

Especially after the events of September 11, it is appropriate that schoolchildren be taught the history of this country—and not be taught that all cultures are equal, that the greatest sin is to be judgmental, that our Founders were contemptible, that our history is nothing but a history of suppression of blacks, women, and American Indians. They should also—this is surely the time for it—be encouraged to read political biographies, of Washington, Jefferson, Adams, Madison, Hamilton, and especially of Lincoln; then, having acquired a taste for biographies, go on as adults to read those of Webster, Clay, and Calhoun; of Roosevelt and Wilson; of Truman and the second Roosevelt. Perhaps, then, all our citizens—young and old—can learn to appreciate the birthright Lincoln spoke of, and to understand better what he meant by this "inestimable jewel."

16

Religion and the Death Penalty

The best case for the death penalty—or, at least, the best explanation of it—was made, paradoxically, by one of the most famous of its opponents, Albert Camus, the French novelist, playwright, and World War II Resistance hero. Others complained of the alleged unusual cruelty of the death penalty, or insisted that it was not, as claimed, a better deterrent of murder than, say, life imprisonment, and Americans especially complained of the manner in which it was imposed by judge or jury (discriminatorily or capriciously, for example), and sometimes on the innocent.

Camus said all this and more, and what he said in addition is instructive. The death penalty, he said, "can be legitimized only by a truth or a principle that is superior to man," or, as he then made clearer, it may rightly be imposed only by a religious society or community, specifically, one that believes in "eternal life."[1] Only in such a place can it be said that the death sentence provides the guilty person with the opportunity (and reminds him of the reason) to make amends, thus to prepare himself for the final judgment which will be made in the world to come. For this reason, he said, the Catholic Church "has always accepted the necessity of the death penalty." This may no longer be the case. And it may no longer be the case that death is, as Camus said it has always been, a religious penalty. But it can be said that the death penalty is more likely to be imposed by a religious people.

The reasons for this are not obvious. It may be that the religious know what evil is or, at least, *that* it is, and, unlike the irreligious are not so ready to believe that evil can be explained, and thereby excused, by a history of child abuse or, say, a post-traumatic stress disorder or a temporal lobe seizure. Or, again unlike the irreligious, and probably without having read so much as a word of his argument, they may be morally disposed

(or better, predisposed) to agree with the philosopher Immanuel Kant—that greatest of the moralists—who said it was a "categorical imperative" that a convicted murderer "must die."[2] Or perhaps the religious are simply quicker to anger and, while instructed to do otherwise, slower, even unwilling, to forgive. In a word, they are more likely to demand that justice be done. Whatever the reason, there is surely a connection between the death penalty and religious belief.

European politicians and journalists recognize or acknowledge the connection, if only inadvertently, when they simultaneously despise us for supporting the death penalty and ridicule us for going to church. We might draw a conclusion from the fact that they do neither. Consider the facts on the ground (so to speak): In this country, sixty-five convicted murderers were executed in 2003 (and fifty-seven in 2004), almost all of them in southern or southwestern and churchgoing states—Virginia and Georgia, for example, Texas and Oklahoma—states whose residents include the most numerous of deeply religious Americans.[3] Whereas in Europe, or "Old Europe," no one was executed and, according to one survey, almost no one—and certainly no *soi-disant* intellectual—goes to church, leaving, in Shakespeare's words, the "bare ruined choirs, where late the sweet birds sang."[4]

As for the death penalty, it is not enough to say that they (or their officials) are opposed to it. They want it abolished everywhere. They are not satisfied that it was abolished in France (in 1981, and over the opposition of some two-thirds of the population), as well as in Britain, Germany, and the other countries of "Old Europe," or that—according to a protocol attached to the European Convention on Human Rights—it will have to be abolished in any country seeking membership in the European Union; and its abolition in Samoa was greeted by an official declaration expressing Europe's satisfaction.[5] (To paraphrase Shakespeare's Hamlet, "What is Samoa to them or they to Samoa that they should judge for it?") In fact, their concern, if not their authority, extends far beyond the countries for which they are legally responsible.

Thus, the European Union adopted a charter confirming everyone's right to life and stating that "no one may be removed, expelled, or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty."[6] They even organized a World Congress Against the Death Penalty which, in turn, organized the first World Day

Against the Death Penalty. They go so far as to intervene in our business, filing *amicus curiae* briefs in Supreme Court capital cases.[7]

What explains this obsession with the death penalty? Hard to say, but probably because abolishing it is one of the few things Europeans can do that makes them feel righteous; in fact, very few. They are now engaged in ratifying a new European constitution, and nowhere in this document—some three hundred pages long, not counting the appendages—is there any mention of religion, of Christian Europe, of God. God is dead in Europe and, of course, something died with him.

This "something" is the subject of Camus's famous novel, *The Stranger*, first published in 1942, sixty years after Nietzsche first announced God's death, and another sixty before the truth of what he said became apparent, at least with respect to Europe and its intellectuals. (As one of them said, and he claimed to be speaking for all Europeans, "Religion is the strangest and most disturbing feature about" America.)[8] The novel has been called a modern masterpiece—there was a time, and not so long ago, when students of a certain age were required to read it—and Meursault, its hero (actually, its antihero), is a murderer, but a different kind of murderer. What is different about him is that he murdered for no reason—he did it because the sun got in his eyes, *à cause du soleil*—and because he neither loves nor hates, and unlike the other people who inhabit his world, does not pretend to love or hate. He has no friends; indeed, he lives in a world in which there is no basis for friendship and no moral law; therefore, no one, not even a murderer, can violate the terms of friendship or break that law. The universe is benignly indifferent to how he lives.

It is a bleak picture, and Camus was criticized for painting it, but, as he wrote in reply, "There is no other life possible for a man deprived of God, and all men are [now] in that position."[9] But Camus was not the first European to draw this picture; he was preceded by Nietzsche who (in Zarathustra's "Prologue") provided us with an account of human life in that godless and "brave new world." It will be a comfortable world—rather like that promised by the European Union—where men will "have their little pleasures for the day, and their little pleasures for the night," but no love, no longing, no striving, no hope, no gods or ideals, no politics ("too burdensome"), no passions (especially no anger), only "a regard for health."[10] To this list, Camus rightly added, no death penalty.

This makes sense. A world so lacking in passion lacks the necessary components of punishment. Punishment has its origins in the demand for justice, and justice is demanded by angry, morally indignant men, men who are angry when someone else is robbed, raped, or murdered, men utterly unlike Camus's Meursault. This anger is an expression of their caring, and the just society needs citizens who care for each other, and for the community of which they are parts. One of the purposes of punishment, particularly capital punishment, is to recognize the legitimacy of that righteous anger and to satisfy and thereby to reward it. In this way, the death penalty, when duly or deliberately imposed, serves to strengthen the moral sentiments required by a self-governing community.

17

Under God

On March 24, 2004, the Supreme Court heard arguments in still another of what civil libertarians insist on calling establishment-of-religion cases, *Elk Grove Unified School District v. Newdow.*[1] While the previous cases dealt with school prayers, for example, or public religious instruction, or the public display of a creche or the Ten Commandments, this one had to do with the words "under God" in the Pledge of Allegiance.

Were it not for the law of these previous cases, this one could have been easily disposed of. The Court could have decided for the school district on the merits, confident that only the most zealous and unrelenting of libertarians would be likely to object. No one is required to make the pledge or utter the word God, and it is hard to believe that, as the plaintiff alleged, his daughter was somehow injured when hearing her classmates utter it. After all, the name of God is invoked on various public occasions by, or in the presence of, presidents, governors, members of Congress, even Supreme Court justices, and no one seems to be any the worse for it. So why may it not be uttered by schoolchildren when pledging allegiance?

The Court could also have sent the case back to the lower court with instructions to dismiss, on the ground that the plaintiff, Michael A. Newdow, lacked standing to sue and, therefore, the court had no jurisdiction because, constitutionally, there was no case. Newdow originally claimed to represent his daughter, of course, but in a formal custody hearing, the girl's mother (and *not* Newdow's wife) was awarded legal custody of the girl and the right to represent her interests, and she is on record as saying that "neither [she] nor her daughter objects to saying the Pledge."

In fact, the justices decided that Newdow lacked standing to bring suit. Instead, they might have seized the opportunity—the best they had had—to correct a pair of mistakes, dating back to the 1940s, when the

Court held that the First Amendment prohibited the states (as well as the national government) from making any law "respecting an establishment of religion."

Previously, everyone having anything to do with the subject understood that the prohibitions of the First Amendment did not apply to the states. This was not an oversight on the part of the men who wrote or ratified the amendment; on the contrary, they expected the states to be concerned with the moral character of the people and, to this end, would provide the young with religious instruction of some sort. In a word, the states would do, and would have to do, what the national government was forbidden to do.

There was a general agreement about this. For example, the same First Congress that forbade the national government to make any law respecting an establishment of religion also adopted an ordinance for the governance of the Northwest Territory which provided (in article 3) that "religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged," and (in article 5) that the states to be formed out of the territory—these proved to be Ohio, Indiana, Michigan, Illinois, and Wisconsin—"shall be republican, and in conformity to the principles contained in these articles."[2] But the states needed no such encouragement; they took it for granted that religion was "necessary to good government," especially republican government, and, with that in mind, made it a part of the public school curriculum even as they established those schools. And so it remained, more or less, until the Supreme Court put an end to it in one of the cases decided in the 1940s. Prior to that time, it went without saying that schoolchildren, in the course of pledging allegiance, might be encouraged to utter the words "under God."

What is of interest in these 1940 cases, aside from the judgments rendered and the specious arguments used to support them, is the heedless manner in which they were decided. Not one of the Supreme Court justices gave any thought, *any* thought whatsoever, to the connection, or even the possibility of a connection, between religious training and the sort of citizen required by a self-governing republic. They simply did not address the issue, as if the cases being decided had nothing to do with it, or as if it were of no importance. They would have us believe that Jefferson was

speaking for its authors—but he obviously was not—when he wrote to the Danbury Baptists that the First Amendment built "a wall of separation between church and state."[3] (Two days after issuing this letter [Sunday, January 3, 1802], Jefferson attended church services *in the House of Representatives* and heard the Baptist John Leland preach the sermon.) Indeed, one of them (Justice Wiley B. Rutledge) went so far as to say that the purpose of the First Amendment "was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[4] Unless he intended deliberately to deceive, no one with any knowledge of our history could have written this.

As a consequence of these decisions, moral education, which had always been understood to be partly a public responsibility, was now held to be exclusively a private one, to be performed, in part, by the churches, but mostly by the parents in the home. Presumably, they will want to teach their children "values," as we now say, but, if so, they will get little help from the law.

At the oral argument, Michael Newdow, appearing for himself, demonstrated that the law of the Constitution favored him, that the Court could not decide for the school district without overruling the previous establishment cases—which is to say (but of course he did not say this), without returning to the correct understanding or meaning of the establishment clause; and this the Court refused to do. Instead, it held that he lacked standing to bring the suit. Nothing would be gained by explaining how the Court's majority reached that judgment; it is enough that I quote the chief justice who, with Justices O'Connor and Thomas, said, "The Court today erects a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim." As he put it, the Court's holding is like the "proverbial excursion ticket—good for this day only."[5]

He is, of course, right about this. What Michael Newdow might not do, other self-styled (and self-righteous) "atheists" will be allowed to do—in fact, will be encouraged to do—and the issue will soon be before the Court again. There will then be no avoiding the constitutional issue, and it is likely that at least some members of the Court will, as Thomas said, take the opportunity to "begin the process of rethinking the Establishment Clause," and, in the process, reverse errors of long standing.[6]

Addendum

1. In the debates in the First Congress, James Madison offered an amendment to the speech and religious clause that would have applied its prohibitions to the states, as well as to the national government. His amendment was adopted in the House (where he served) but was defeated in the Senate.

2. Then, in 1876, Senator James Blaine, at the behest of President Ulysses S. Grant, proposed a somewhat similar amendment. This, too, passed in the House and went down to defeat in the Senate, coming up one vote short of the required two-thirds majority. But what Madison could not do in 1789, or Blaine and Grant in 1876, a divided Supreme Court, without so much as a by-your-leave, effectively did in the 1940s.

3. Quite apart from whether it applies to the states, the establishment clause was not intended to prohibit such practices as public references to God. As the chief justice said in his separate opinion in the Newdow case, "Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound."[7] He then mentioned a number of them.

18

What Does the Constitution Expect of Jews?

The short answer to this question is that the Constitution expects of Jews what it expects of everybody. George Washington expressed this perfectly in his famous (and very familiar) response of August 17, 1790, to the Hebrew Congregation of Newport, Rhode Island:

> It is now no more that toleration is spoken of as if it was by the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support. . . . May the Children of the Stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other Inhabitants; while every one shall sit in safety under his own vine and figtree and there shall be none to make him afraid.[1]

All that is required of us, Jew and Christian alike, is a pledge of allegiance to Americanism, as Martin Diamond used to say, to the flag of the United States and "to the republic for which it stands."

The principle involved here is not that of the English Toleration Act of 1689 which, according to Thomas Babington Macaulay, "recognized persecution as the rule, and granted liberty of conscience only as the exception."[2] Here liberty of conscience is the rule, not an indulgence or a privilege granted to certain minorities. As Thomas Jefferson said in what became

the Virginia Statute for Religious Freedom, "Our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry."[3] Liberty of conscience, he went on, is one of the "natural rights of mankind," and under a government instituted "to secure these rights," there are no religious minorities, because there is no recognized religious majority.[4]

Indeed, the Constitution speaks not of Christian and Jew, but of "persons" (and "Indians, not taxed"), and emphasizes its neutrality by providing in article 6 that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Persons of any religious persuasion—Jews, Turks, infidels, and (to speak the frequently voiced prejudice of the time) even "Papists"—are eligible to become citizens and to hold office under this Constitution. And, in principle at least, what the Constitution expects of one group it expects of all, no more and no less.

But that, of course, is the simple view of the matter, as Alexander Hamilton once said on another subject.[5] In 1776 we declared ourselves a nation, and a new order of the ages, by invoking "the Laws of Nature and of Nature's God," but we continued to acknowledge the biblical God of our fathers; unlike the French revolutionists who were shortly to follow us, we made no effort to obliterate every vestige of what we had been. Unlike the French, we did not revise the calendar to rid it of every element of religious tradition—beginning the year at the autumnal equinox, rather than January 1 (the day on which the church celebrated the Feast of Circumcision), replacing the seven-day week of the Bible with a "decade" of ten days, giving the months new names drawn from nature and related to the seasons (Vintage, Mist, Frost, Snow, Rain, Wind, Seedtime, Blossom, Meadow, Harvest, Heat, and Fruits), celebrating not holidays (or holy days) but festivals named Virtue, Genius, Labor, Opinion, Rewards (and, in the leap year, the Festival of the Revolution), and, finally, designating 1792, the year of the first republican constitution, Year One. Napoleon put an end to this nonsense on the tenth of Snow, year fifteen, or on what we call the first of January, 1806.

Unlike, as I say, the French, the Americans of 1787 expressed no overt hostility to religion in general or Christianity in particular. Article 7 of the Constitution marked the occasion in a traditional and quite undramatic

fashion: "Done in Convention, by the Unanimous Consent of the States present, the Seventeenth Day of September, in the Year of our Lord one thousand seven hundred and Eighty seven, and of the Independence of the United States of America the Twelfth."

What does the Constitution expect of Jews? What it expects of everybody. Among other things, it expects them to reckon the years from the birth of Jesus, and, in addition, and for one purpose at least, to recognize Sunday as the Sabbath. "If," reads a portion of the veto provision in article 1, section 7, "any Bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law." America is not, as the Supreme Court once said it was, "a Christian nation," not officially; America is a country inhabited mainly by Christians, and in certain respects it is easier for Christians to live here.[6] They can more readily accommodate themselves to its ways—these two constitutional references serve to remind us of that—because in the determining of those ways it is inevitable that religious opinions carry more weight than do "opinions in physics or geometry."[7]

This was especially true at the beginning. Like the Constitution of the United States, most of the early state constitutions recognized the principle of liberty of conscience, but they also required oaths of office that only Christians could honestly take. Here, for example, is Delaware's: "I, A. B., do profess faith in God the Father, and in Jesus Christ His Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the Holy Scriptures of the Old and New Testament to be given by divine inspiration."[8] A similar provision in the constitution of Pennsylvania caused the Jews of the city ("who are but few in number") to protest in 1793 that they, too, were patriots, that they, too, had "suffered for their attachment to the Revolution principles," and that "this religious test deprives [them] of the eminent rights of freemen, solemnly ascertained to all men who are not professed atheists."[9]

And unlike the Constitution of the United States, most of the early state constitutions, in one way or another, spoke of the necessity of morality or civic virtue and its dependence on some form of religious education. They encouraged religion, and indeed were encouraged by Congress to do so.

Here is article 3 of the Northwest Ordinance, adopted by the Continental Congress on July 13, 1787, and readopted by the First Congress, under the new Constitution, on August 7, 1789: "Religion, Morality and knowledge being necessary to good government and the happiness of mankind, Schools and the means of education shall forever be encouraged."[10] Should, that is, be encouraged by the states that would in due course be organized in that territory—Ohio, Michigan, Indiana, Illinois, Wisconsin, and part of Minnesota.

As I have indicated, most of the original states were already doing this; they needed no encouragement from Congress. Religion was a private matter, Maryland said in its Declaration of Rights, which meant that "no person ought by any law to be molested in his persuasion of profession, or for his religious practice"—so long, one might say, as he practiced religion, for, as that same article begins, "It is the duty [note: the *duty*] of every man to worship God in such a manner as he thinks most acceptable to him."[11]

Such statements were typical, and so, at the time, was the tendency to identify religion with Christianity. Under the Massachusetts constitution of 1780, "all men" had the right—as well as the *duty—to* worship as they pleased; and to facilitate the performance of that duty, the "several towns, parishes, precincts, and other bodies-politic" were expected to provide, "at their own expense," for the public worship of God and the support of "teachers ["*Protestant* teachers"] of piety, religion, and morality." In addition, the constitution guaranteed the protection of the law to "every denomination of Christians."[12]

But even at the state level there was little overt hostility to Jews. During the ratification debates in North Carolina, the Reverend David Caldwell complained that by prohibiting religious tests, the federal Constitution issued an invitation to "Jews and pagans of every kind to come among us," and he feared that at some future time "this might endanger the character of the United States."[13] But he was reassured by Governor Samuel Johnston that although it was possible that "Jews, pagans, etc." might emigrate to the United States, their numbers would not be "in proportion to the emigration of Christians." Besides, he went on, "In all probability, the children even of such people would be[come] Christians."[14] And Pennsylvania was more than willing not only to tolerate but to accommodate its Jewish citizens. In

1790, a mere seven years after the Jews of Philadelphia had issued their protest against it, the Trinitarian oath requirement was replaced in the new state constitution with a declaration to the effect "that no person, who acknowledges the being of a God and a future state of rewards and punishments, shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under his commonwealth."[15]

One historian of the subject, Morton Borden, says that by 1788 Jews had achieved toleration, but there is evidence that more than toleration was at work even then.[16] Speaking that year in the Massachusetts ratification debates, the Reverend Mr. Shute said this:

> Far from limiting my charity and confidence to men of my own denomination in religion, I suppose, and I believe, sir, that there are worthy characters among men of every denomination—among the Quakers, the Baptists, the Church of England, the Papists; and even among those who have no other guide, in the way to virtue and heaven, than the dictates of natural religion.[17]

And what was at work had little or nothing to do with Jews, who, in the event, numbered a mere two thousand in a total population (in 1790) of just short of four million.

What was at work was the right of liberty of conscience—and liberty of conscience meant equality of religious opinion in the eyes of the law, and eventually in the eyes of the people, legally, and, in due course, socially.[18] "The legitimate powers of government extend to such acts only as are injurious to others," Jefferson wrote, but "it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg."[19] That principle was embodied in the federal Constitution, but its influence was felt in the states long before it was formally applied to them by way of the Fourteenth Amendment. Indeed, even by Tocqueville's time it appears to have become pervasive. As he observed, public opinion may have obliged everyone to attend church services, but it obliged him to very little else. "Go into the churches (I mean the Protestant ones)," he wrote to his friend Louis de Kergorlay, "you will hear morality preached, of dogma not a word. Nothing which can at all shock the neighbor; nothing which can arouse the idea of dissent."[20] The same point was made by that earlier

Frenchman-turned-American, J. Hector St. John de Crevecoeur, who, having discussed how Europeans become Americans, went on to explain how "the various Christian sects [are] introduced, wear out, and how religious indifference becomes prevalent." That religious indifference, he concluded, "is at present one of the strongest characteristics of the Americans."[21] And this was in 1782.

What does the Constitution expect of Jews? What it expects of everybody: We all, Christians and Jews alike, have a "duty" to go to the church of our choice. To go to church, perhaps, because we are expected, but certainly not because we are required, to take care of our souls. A government with the latter concern would be required to prescribe the means appropriate to the care of souls; but our governments accept the truth of Locke's teaching that "the care . . . of every man's soul belongs unto himself."[22] Go to the church of your choice, and there acquire the habits of good citizenship. So long as that *political* purpose is met, the Constitution is indifferent as to mode of worship or the god worshiped.

Of course, the hope was that by favoring none, all would be "mild," to use Tom Paine's word. "All religions are in their nature mild and benign," Paine wrote in *Rights of Man*, and they lose this "native mildness, and become morose and intolerant" when connected with the state, when, as we say, they are established.[23] This point was repeated by Jefferson in his *Notes on the State of Virginia* and elaborated by his fellow Virginian, St. George Tucker, in his widely read edition of Blackstone's *Commentaries*, read by the lawyers who in turn made the laws. What is needed, Tucker said, is a "rational and liberal religion; a religion founded on just notions of the Deity, as a Being who regards equally every sincere worshipper, and by whom all are alike favoured as far as they act up to the light they enjoy." In other words, a God whose only command is, worship sincerely, a command that can be obeyed as well by Jew, Christian, Muslim, and even by those who know no other guide to virtue and heaven "than the dictates of natural religion." Worship sincerely, according to the light that you enjoy. "It is," Tucker goes on, "only this kind of religion that can bless the world, or be an advantage to society."[24] One is reminded of the Roman situation as described by Gibbon: "The various modes of worship which prevailed in the Roman world were all considered by the people as equally true, by the philosophers as equally false, and by the magistrates as equally useful."[25]

But this is too cynical a note to sound at the end. It is better to close with a reference to the "father of the Constitution," James Madison. Writing to Jefferson at the close of the Constitutional Convention, Madison referred to the danger of religious "enthusiasm," as he put it, how this enthusiasm, or excessive zeal, gives rise to political oppression, and, therefore, how it was necessary to guard against it.[26] He was confident that in the Constitution the Framers had found a way of tempering it. Now, two hundred years later, we are in a position to say that he was right about this.

What does the Constitution expect *of* us? Morality without Moral Majority. What does the Constitution permit *to* us? Piety without zealotry. Within these limits—and who can complain that they are too narrow?—America can be, in the words of the old Book of Common Prayer, a haven for "all sorts and conditions of men." And the foundation of this haven—this country safe for the Jews and safe for the rest of us—is not Christianity, certainly not the church of that prayer book, and not what we have come to call Judeo-Christianity, but that liberal Lockean right—liberty of conscience.

Part III

Academic Matters

Preface

Our word "school" derives from the Greek *scolé*, which means leisure. There is a lesson to be had in this. It tells us that, originally, schooling was an activity only a few might enjoy, those few who, because of their wealth, did not have to spend most of their waking hours working to provide themselves with the necessities of life: food, shelter, and the means of defense. This meant that most men were not free, and could not possibly be free. Without arguing the point here, there is a connection between leisure and freedom, schooling and freedom, the liberal (or liberating) arts and freedom, especially freedom of the mind. It was in the universities—if not there, where?—that these few were to be provided with a liberal education. That, at least, was the original idea,

But thanks to the Constitution and the free-market economy promoted and protected by it, we have created great wealth in this country, and so distributed it that almost all of our young go to school and almost half of them go on to college or university. It was almost inevitable that these numbers would have an impact on the ways of the university, on its governance as well as what is taught. So it was that the old liberal curriculum had to be scrapped and replaced by one more "relevant," and by relevance, professors meant dealing directly with what were considered to be the problems of the day: racism, sexism, and (in the 1960s) the Vietnam War. Then came student sit-ins, strikes, riots, and, at Cornell University, campus arson and students armed with guns.

Surprisingly—one would have thought—this met little resistance from within the university; administrators and professors, even (in fact, especially) liberal arts professors, acquiesced in the new order, some willingly or indifferently, and others cowardly. Allan Bloom, who witnessed all this at Cornell, deserves the last word here: "A few students discovered that pompous teachers who catechized them about academic freedom could, with a little shove, be made into dancing bears."[1]

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The Assault on the Universities: Then and Now

The assault on the university began with the student revolt at the Berkeley campus of the University of California in December 1964. Berkeley was followed by Columbia in 1968, Harvard and Cornell in 1969, and Yale and Kent State in 1970; during this same period, some three hundred universities were the scenes of student sit-ins, building takeovers, strikes, riots, and other forms of rebellious behavior. In addition to its violent character, what distinguished this assault from those of the past is that it came from within the university itself, and that it met little resistance from professors and administrators.

The issue at Berkeley, initially at least, was free speech, but free speech had little or nothing to do with the subsequent campus disruptions; here the issues were, or were said to be, university involvement in neighborhood deterioration, in the draft and the Vietnam War, and in racism, as well as university governance, especially in disciplinary matters, and the alleged irrelevance of the curriculum. Except for the neighborhood issue (so prominent at Columbia), all of these figured in the events at Cornell which, under pressure from gun-bearing students, proceeded to jettison every vestige of academic integrity.[1] In this respect, the Cornell of the sixties became the prototype of the university as we know it today.

Shortly after he was installed as Cornell's president in 1963, James A. Perkins formed a Committee on Special Educational Projects, charged with recruiting black students whose SAT scores were substantially below (as it turned out, 175 points below) the average of Cornell's entering class. Subsequently, it was revealed that many of these students were to be recruited from the slums of the central cities. Perhaps not surprisingly, they proved incapable of being, or were unwilling to be, integrated into or

assimilated by the Cornell student body; assimilation, they said, threatened their identity and needs as blacks.

In 1966, they formed an Afro-American Society which, in short order, demanded separate living quarters, an Afro-American Studies Program—seizing a university building to house it—and ultimately an autonomous degree-granting college. To justify it, they issued a statement saying that "whites can make no contribution to Black Studies except in an advisory, non-decision making or financial capacity," and, therefore, that the program must be developed and taught by blacks and, as it turned out, only to black students.

This demand for an autonomous, degree-granting college took the form of an ultimatum, to which President Perkins responded by saying that he was "extremely reluctant to accept this idea of a college exclusive to one race, but [that he was] not finally opposed to it; it would involve a lot of rearranging of [his] own personality." In the event, and, as those who knew him had come to expect, his "personality" needed no rearrangement. As he said after the guns had brought him to his knees, "There is nothing I have ever said or will ever say that is forever fixed or will not be modified by changed circumstances." To head this college, or, as it came to be known, this Center for Afro-American Studies, the university, without the consent of the faculty, hired a twenty-eight-year-old graduate student in sociology at Northwestern University who, despite repeated requests, failed to submit a statement explaining the center's purpose and operation. (The closest thing to a statement of purpose came from the Afro-American Society, which said that the aim of the center "would be to create the tools necessary for the formation of a black nation.") To teach the first course in the program (on "black ideology"), the university, over the objection of two (and only two) faculty members of the appropriate committee, hired a twenty-four-year-old SNCC (Student Non-Violent Coordinating Committee) organizer who had completed a mere two years of college. This jettisoning of academic standards with respect to the courses to be taught and the faculty to teach them was largely the work of various members of the administration, only one of whom (the vice provost) was honest enough to admit that it was being done under pressure from the Afro-American Society—but, he assured the few dissenting members of the faculty, "It would never be done again." To refuse to accommodate the black "moderates," he said, would only strengthen the hands of the "militants."

Within a few months, these "moderates" were burning buildings; joining with the SDS (Students for a Democratic Society) to barricade Chase-Manhattan bank recruiters; removing furniture from a women's dorm and placing it in a building taken over by the Afro-American Society; disrupting traffic; overturning vending machines; trashing the library; grabbing President Perkins and pulling him from a podium (and, when the head of the campus police rushed to Perkins's aid, driving him off with a two-by-four); harassing campus visitors with toy guns; and, at five or six o'clock of a cold morning, seizing the student union building, driving visiting (and shivering) parents from their bedrooms—it was Parents Weekend—out onto the street. Justification for this seizure was said to be the burning of a cross on the lawn of a dorm for black women, which, the university now implicitly admits, was done by the "moderate" blacks themselves. They then brought guns—real, not toy, guns—into the student union and, two days later, at gunpoint, forced the university to rescind the mild (very mild) punishment imposed on the blacks found guilty of these various offenses by the student-faculty Committee on Student Affairs; in effect, they took control of the university. Photographs of the arms-bearing blacks, led by Thomas W. Jones, and of Vice President Steven Muller signing the surrender document, appeared on the covers of the leading national news magazines.

All that remained to be done was to get the faculty to agree to the surrender terms, but this proved to be easy. Jones went on the radio to say that Cornell had only "three hours to live," and that the "racist" professors—by which he meant those who opposed the surrender—would be "dealt with." (But Cornell's most famous philosophy professor was speaking for the majority of the faculty when he said, "You don't have to intimidate us.") The final act took place at a Nuremberg-like faculty-student rally at which one famous professor after another pledged his allegiance to the new order. So much for academic freedom, liberal education, and everything else the university was supposed to stand for.

No one should have been surprised by the faculty's willingness to capitulate to the armed students; the stage was set for it a year earlier when black students brought a charge of racism against a visiting professor of economics—he had made the mistake of employing a "Western" standard to judge the economic performance of various African countries—and, not satisfied with the professor's subsequent apology (which the administration

required him to make), took possession of the economics department office, holding the chairman and the department secretary prisoner for some eighteen hours. The students were never punished, and, much to the relief of the dean of the college of arts and science, the accused professor left Cornell. On the basis of the findings of a special faculty-student commission, the dean then pronounced the professor innocent of racism, but went on to announce that the university and faculty were guilty of "institutional racism" and were obliged to mend their ways.

Nor should anyone have been surprised by the faculty's willingness to "reform" the curriculum, which is to say, to obliterate whatever differences there might still have been between the purposes of higher education and what were perceived to be the immediate, and pressing, concerns of the world outside. In the years immediately preceding the "crisis," one requirement after another of the old "core curriculum" had been dropped in favor of what can best be called "consumer freedom," or, in the jargon of the day, of allowing the students "to do their own thing." One of the university's most famous professors, Paul de Man (of whom, more later), argued that nothing of value would be lost by doing away with these requirements.

Begun as an assault on university "racism," the Cornell student uprising quickly became an assault on the integrity of the academic enterprise, an assault that was bound to succeed because it was met with only nominal resistance on the part of the faculty, and none at all from the administration. Although university rules were broken left and right, the dean of the law school supported the president and voted for peace (to paraphrase Shakespeare's Hamlet, "What was law to him, or he to law, that he should weep for it?"). At a special meeting of the arts college (in which, for the first time in its history, students were allowed to participate), the so-called humanists confessed their sins and called upon the president to do what he was not legally entitled to do—namely, nullify all the penalties imposed on black students "since the beginning of [the] spring term"—and the natural scientists, in the spirit of "better them than us," remained aloof from the battle, confident that none of it would reach the doors of their laboratories.[2] On the whole, just as George Orwell's Winston Smith came finally to love Big Brother, the typical Cornell professor came to admire the student radicals and sought their approval. From his perspective, theirs was the only moral game in town.

The black students, while threatening the lives of named members of the faculty, claimed to be putting "their [own] lives on the line"; others, inspired by Cornell's resident priest, Father Daniel Berrigan, insisted that they had "the moral right to engage in civil disobedience" and proceeded ceremoniously to burn their draft cards; the SDS, the vanguard of "the New Left," led the assault on the "irrelevant" curriculum, insisting that the university could not remain disengaged from the great moral issues, war, racism, and the rank injustice of "bourgeois society."[3] And the largely bourgeois faculty agreed, thereby demonstrating that Andy Warhol was right when he said that "nothing is more bourgeois than to be afraid to look bourgeois."[4]

With the faculty acquiescent and the students either triumphant or confused, Perkins had only to deal with the university trustees. They had been willing to fund the black studies program with a million dollars, and had remained quiet when Perkins placed the university airplane at the disposal of black students, enabling them to go to New York City to purchase, with $2,000 in university funds, a set of bongo drums for Malcolm X Day. The one thing they could not abide was negative publicity—could not abide and, as it turned out, could not prevent. Covering the Cornell story for the *New York Times* was a Pulitzer Prize–winning war reporter, Homer Bigart, who had learned to distrust official press releases, in this case those issuing from Muller's public relations office. Bigart's stories provided *Times* readers with a vivid account of what was, in fact, going on at Cornell; and when, despite Perkins's efforts to have it suppressed, the *Times* eventually ran on its front page a particularly damaging story summarizing the events (and the *Cornell Alumni News*, a publication with forty thousand subscribers over which Perkins and Muller had no control, hurried into print its own damaging account), the trustees called for Perkins's resignation—or, according to the story handed out, he chose to resign.

But Perkins and his friends survived, their reputations (at least in some circles) unblemished. Muller became president of Johns Hopkins University; in 1993, Thomas Jones, the erstwhile black revolutionist, having been named president of TIAA-CREF (Teachers Insurance and Annuity Association-College Retirement Equities Fund, the world's largest pension fund), was appointed to the Cornell Board of Trustees; and, in 1992, by way of recognizing "his outstanding leadership and extraordinary contributions to [the] University," Cornell established the James A. Perkins Professorship of

Environmental Studies. In 1995, Jones "made a large contribution to the University" enabling it to endow an annual Perkins Prize of $5,000 "for the student, faculty, staff member or program that has done the most during the preceding year to promote interracial understanding and harmony on campus."

To say the least, not everyone thought Perkins deserved this recognition—Bayard Rustin, the great civil rights leader, called him "a masochistic and pusillanimous university president"—but even his critics would have to admit that Perkins left his mark on the university, and not only on Cornell.[5] By surrendering to students armed with guns, he made it easier for those who came after him to surrender to students armed only with epithets ("racists," "sexists," "elitists," "homophobes"); by inaugurating a black studies program, Perkins paved the way for Latino studies programs, women's studies programs, and multicultural studies programs; by failing to support a professor's freedom to teach, he paved the way for speech codes and political correctness; and, of course, he pioneered the practice of affirmative action admissions and hiring. In a word, while it would exaggerate his influence to hold him responsible for subsequent developments, he did provide an example that other institutions found it convenient to follow. For evidence of this, consider these news items, culled from four months of the *Chronicle of Higher Education*:

- Bates College students protest admissions policy; student body only 8 percent minority; dean of admissions agrees with protesters (April 13, 1994).
- Cornell trustees approve a Latino Living Center and studies program after Hispanic students occupy administration building and block off sections of the campus (April 30, 1994).
- Under student pressure, University of Wisconsin (Milwaukee) is likely to approve gay and lesbian studies program (April 30, 1994).
- Howard University asks Yale professor David Brion Davis (Pulitzer Prize, National Book Award, for his studies of slavery) to cancel his lecture because of anti-Semitic atmosphere on campus (May 4, 1994).

- Vassar College found by U.S. District Court to have discriminated by denying tenure to woman; judge (not Vassar) found that her scholarship record was far superior to that of three men who received tenure (June 1, 1994).
- University of Oregon requires all students to take two courses meeting the "Race, Gender, Non-European American Requirement" (June 15, 1994).
- U.S. Department of Education, Office of Civil Rights, cites eighty-six colleges for violating rights of disabled, forty-four for sexual bias, forty-four for racial and ethnic bias, and one for age bias (June 22, 1994).
- Northeastern University accords gays and lesbians preferential treatment in hiring (June 29, 1994).
- National Endowment for the Humanities funds summer institute with $320,000 to help professors and administrators think about how diversity and democracy "should be dealt with in the classroom" (June 29, 1994).
- University of Wisconsin requires all students to take course in ethnic studies (June 29, 1994).
- Under pressure from U.S. Department of Education, University of Missouri will triple black enrollment by granting scholarship aid, despite low test scores or "marginal grades," to all but handful (July 13, 1994).
- University of Michigan criticized for failure to hire sufficient number of black and Hispanic professors (July 13, 1994).
- Georgetown Law School admits, then rejects, white student who, on application form, checked box marked "Black/A.A." (July 20, 1994).

When Perkins assumed the presidency of the university in 1963, there were only twenty-five black students at Cornell (out of a total of about eleven thousand students). Too few to be segregated, these twenty-five lived

in the same dormitories and received the same education as the other students. By the time of Perkins' departure in 1969, there were two hundred and fifty black students on campus, but with their own, self-segregated living quarters and their own studies program.

What was true then remains true as I write this essay in 1997, and not merely at Cornell. Blacks are a visible presence on every campus, but, on every one I know or know about, so are the racial divisions. For example, black and white students at the University of Pennsylvania "tend to live in separate dormitories, beginning with the freshman year; they eat in separate portions of the dining hall; they belong to different clubs and campus organizations."[6] The only thing they seem to have in common, beyond their status as students in the University of Pennsylvania, is the desire to live apart from each other. This is not as the university would have it; on the contrary, it would prefer (or, at least, claims to prefer) an integrated student body, one where students associate regardless of race, sex, religion, national origin, or "sexual orientation"; such differences are supposed to be irrelevant, and on most campuses probably are irrelevant.

But there is one difference that is not irrelevant and the effects of which cannot be ignored, especially in a university: a difference in aptitude (or whatever it is that is measured by the SAT). Aptitude is directly, and predictably, related to success or failure in the university (and, since birds of a feather tend to flock together, at least indirectly related to campus social relations); and, because the SAT is a reasonably reliable measure of it, there is no denying that the difference between white and black students is huge. At Penn, the mean SAT score (verbal and math) of the whites is 150 points higher than that of the blacks; translated into centiles, the SAT score of the average black student is about equal to the SAT score of the tenth percentile of white students.[7] This means that 90 percent of the whites and 50 percent of the blacks are above that point (whatever it is), and 10 percent of the whites and 50 percent of the blacks are below it. What is true at Penn is true at the other so-called elite institutions—but less so at those that are able to attract the best black students—and, judging from the data from the universities of Virginia and California, the gap between blacks and whites may be even greater in the state universities.

In effect, as was the case at Cornell in the sixties, affirmative action means admitting students from different worlds, students with different

capacities, interests, and habits, students who have little in common but, if left to their own devices, might be expected to live together peaceably even if separately; like members of the general public (65 percent of whom now approve of interracial dating, for example), students have come to be tolerant of differences. Unfortunately, they are not left to their own devices; instead, Penn subjects them to a steady drumbeat of propaganda—the students describe it as political indoctrination—urging them to be "sensitive and accepting of difference," the consequence of which, as the students themselves admit, is a campus "obsessed, mesmerized, driven by an unceasing battle between the various racial, ethnic, and sexual groups."[8]

This indoctrination begins with freshmen orientation when, in separate programs, black students are told, to put it simply, that the University of Pennsylvania is a racist institution, with a racist curriculum, a racist faculty and student body, and the whites, in turn, are harangued about their alleged racism.[9] Thus, as soon as they set foot on campus, students are informed, in effect warned, that, depending on their race, they will be treated differently and unequally; and so they are, and so are professors. The white student who shouts, "Shut up, you water buffalo," is charged with racial harassment, but the black students who steal and then destroy an entire pressrun of the student newspaper are not even reprimanded; the white Jewish professor who refers to himself and black students as "former slaves" is suspended for a semester without pay and is required to attend "sensitivity and racial awareness sessions," but the black professor who, in public, calls him an "asshole" is made head of the Center for the Study of Black Literature and Culture, and is named to the search committee charged with finding a new president to replace the man who had presided over these events, Sheldon Hackney, who, in turn, is named Chairman of the National Endowment for the Humanities by President Clinton.[10]

The situation at Penn is similar to that at Cornell in 1969 and, although not everywhere to the same extent, similar to that on most campuses today. Political correctness follows on affirmative action, and it is not at all clear that even its intended beneficiaries, to say nothing of the benefiting institutions, are the better off because of it. Many more black students are enrolled, but, despite grade inflation, their dropout rate greatly exceeds that of white students. What effect this has on their pride, or as we say today, their "self-esteem," is difficult to calculate, but not to imagine. The university

encourages them to attribute their difficulties to white racism, but the honest among them know this not to be the case. Even those who would have been admitted without it are forced to bear the stigma attached to affirmative action; they can never be sure they are not perceived by their white fellow students as the beneficiaries of racial preference. No one, especially no one otherwise qualified, likes it to be thought he is being admitted because he is black (or is being hired or promoted to tenure rank because she is a woman); but where affirmative action is the rule, it is not easy to overcome the suspicion that this may indeed be the case. The highly qualified Susan Estrich, the first woman in ninety years to serve as president of the *Harvard Law Review*, said she did not know "a successful woman or minority who hasn't somewhere along the way, faced the assumption that they didn't quite deserve what they earned." As she put it, "We who are supposed to be its beneficiaries also pay the price of affirmative action."[11]

To say the least, these programs are of little use to the blacks, they breed cynicism among the whites, and they have a corrupting effect on the institutions; but, even if they were to be no longer required by the federal government, we are not likely to see the end of them in the private colleges and universities. They were initiated at Cornell and elsewhere because they were thought to be a way of alleviating a social problem, but they are retained probably because they make their champions feel good. They allow them to exhibit their compassion, and compassion, when detached from its religious foundations, is one way of expiating guilt. (Hence the "limousine liberal.") Compassion is also accompanied—not always, but frequently—by a sense of superiority; the healthy or wealthy one feels superior to the other who is sick or poor, both because it is the other who is suffering and the one who can provide relief. Sympathy, therefore, especially when one acts on it, is satisfying; it makes one feel good. As Clifford Orwin writes, "This is what lends credence to the Hobbesian view that sympathy is merely self-concern on vacation."[12]

Affirmative action for blacks was intended, ultimately, to bridge the economic and social gap between the races, but nothing similar to this can be said about women's studies courses which, by somebody's count, now number in the tens of thousands. The more radical among them—Christina Hoff Sommers calls them "gender feminist courses"—can have no other purpose but to teach women to hate or despise men, and in the

process they threaten to transform the university into a sort of boot camp for culture warriors.[13]

Unaware that it takes two to tango, even the moderate programs proceed on the assumption that women can be studied apart from men, and have as their purpose to divide the sexes, not bring them together. Yet, there are few, if any, university presidents (still largely men) who object to the establishment of these programs. Like James Perkins before them, they apparently see no reason, or are too weak, to object; or perhaps they pretend ignorance of what is being taught in them.[14] Whatever the explanation, the situation brings to mind Tocqueville's prediction of what we can expect at the end of the women's project, namely, "weak men and disorderly women."[15]

Although a legacy of the sixties, affirmative action—for women or even for blacks—was not the principal cause for which the students took to the barricades in those turbulent times. True, they accused the universities of racism (as well as complicity in the draft and Vietnam War), but, like their counterparts in France and Germany—remember Rudi Dutschke?—they fancied themselves part of a mass movement against the "repressive system," or the "technological culture" being imposed on them by the universities. According to the chroniclers of the Berkeley "rebellion," the students of the sixties were searching for "authentic values," and could not find them in the courses available to them.[16] The same complaints were heard at Cornell (as well as at Columbia, Harvard, Yale, and the rest), where students paraded as New Left "revolutionists," all the while expressing their contempt for "bourgeois society."[17]

The antibourgeois sloganeering, so popular, so easy at the time, was mostly cant, as Richard Nixon demonstrated when he put an end to the draft and, with it, the so-called student movement. The radical students of the sixties may have hated bourgeois society (and despised its representatives), but, having no clear idea of what to put in its place, they abandoned politics for the drugs and sex of Woodstock. They should find the university much more to their liking today.

For the others, the sort of students who took no part in the sixties rebellions, the universities continue their bourgeois ways. According to a recent report, over 50 percent of the baccalaureate degrees in 1993 being awarded in our colleges and universities were in those most bourgeois of subjects, engineering, business, and other professional programs (excluding education).[18]

There is, of course, nothing despicable about learning how to make a living; on the contrary, providing for oneself (and for one's family) is, as Tocqueville points out, one of the things that distinguishes a free man from a slave.[19] But the radical students were justified in thinking that vocational training is not the proper business of the university. Americans have never had to be encouraged to look after the practical side of things; they do that for themselves. As Tocqueville said, "People living in a democratic age are quite certain to bring the industrial side of science to perfection anyhow," which is to say, without being encouraged to do so.[20] This explains why the taxpayers and alumni who pay the piper are disposed to call an industrial or vocational tune. Yet, perhaps uncharacteristically, they continue to support the universities even though so much of vocational training—basic economics, business, accounting, computer science, and the like—could be provided at less than half the cost by the community colleges. (Less than 18 percent of Maryland's higher education budget is allocated to community colleges, even though they enroll 57 percent of the state's undergraduates.) They probably support the universities because they think it important that students—even prospective engineers, bankers, lawyers, doctors, accountants, and the like—should have some acquaintance with the humanities, or, as they might say (but with only the vaguest idea of what they mean by it), with "culture." Before contributing to the annual fund drives, however, they would do well to learn how these "culture" courses are being taught these days.

Although not the first to define the term as it is used in this context, Thomas Carlyle (in the 1860s) spoke of culture as the body of arts and learning separate from the "work" or "business" of society. This definition has the merit of reflecting (and that very clearly) the problem that gave rise to the culture movement in the nineteenth century. Carlyle was preceded by Coleridge, Keats, and Wordsworth (who, in his role as poet, saw himself as an "upholder of culture" in a world that had come to disdain it); by Shelley (who said that society could do without John Locke "but not without Dante, Petrarch, Chaucer, Shakespeare"); by John Stuart Mill, for whom culture meant the qualities and faculties that characterize our humanity, or those aspects of humanity that he, like Tocqueville, foresaw might be absent in a utilitarian or commercial society; and Carlyle was followed by Matthew Arnold, for whom culture meant not only literary pursuits but—in a

sentence that became familiar if not famous—the pursuit of "the best which has been thought and said in the world."[21]

These critics and poets had a concern for the sublime (or the aesthetic) and a complaint against the modern commercial and bourgeois society in which the sublime, they feared, would have no firm place. The philosophical founders of this new society—particularly John Locke and Adam Smith—promised to provide for the needs of the body (and in this they surely succeeded); culture was intended to provide for the needs of the soul. Coleridge made this the business of his "clerisy," an official body—originally (as in the case of the Church of England), but not necessarily, a religious corporation—set apart and publicly endowed for the cultivation and diffusion of knowledge. Unable, for constitutional reasons, to establish a "clerisy," America assigned this task to the universities and, more precisely, to their humanities faculties. Unfortunately, as Allan Bloom wrote, "The humanities are now failing, not for want of support but for want of anything to say."[22] Or, as he might have said, what the humanities are now saying is a sophisticated version of what the radical students used to say.

Shortly after Bloom published *The Closing of the American Mind*, a trenchant account of the state of the humanities in this country, and especially in the universities, the American Council of Learned Societies assembled a group of distinguished humanities professors and charged them with writing a response to it. Their report acknowledged the book's "disturbingly popular" success, but insisted that the attacks on the humanities (by Lynne Cheney and William Bennett, as well as by Bloom) "would be comic in their incongruity if they were not taken so seriously by so many people, with such potentially dangerous consequences." It goes on to say that "such attacks mislead the public [and] give students quite the wrong impression about what the humanities are doing." Contrary to what the critics are alleged to be saying, students are reading the great books (or, as the report puts it by way of casting doubt on their greatness, the "great books"), but they have "to learn to think about them in ways that do not suppress the challenges of contemporary modes of analysis."[23] But in making that statement about the humanities having nothing to say, Bloom was referring to deconstructionism, the most prominent of those "contemporary modes of analysis," the mode of analysis then favored by—to quote the ACLS report, "the best scholars in the humanities today."

Deconstructionism was brought to America by the Belgian-born Paul de Man (among others). When de Man died in 1983, Yale (where he had been teaching after leaving Cornell) is said to have gone into mourning, and President A. Bartlett Giamatti declared that "a tremendous light for humane life and learning is gone and nothing for us will ever be the same."[24] Giamatti himself was soon to resign and become, first, president of the National Baseball League and then baseball commissioner (neither one the most humane of vocations); but there is little doubt that in his eulogy on de Man he was speaking for the Yale literary faculties and, indeed, for the Modern Language Association, the governing body of contemporary humanities. When, in 1986, J. Hillis Miller became president of the MLA, he said, "The future of literary studies depends on maintaining and developing that rhetorical reading which is today called 'deconstruction.'"[25]

What, then, is deconstructionism?

An answer to this question is not easy to come by. As one might expect, there is a vast secondary literature on the subject, but, leaving aside the polemical and, therefore, unreliable attacks written by its enemies, most of it is either unintelligible or (at least, for someone not schooled in contemporary literary theory) incomprehensible. Consider the following passage from the pen of a Cornell professor of history:

> De Man's very understanding of language in his later works made dispossession, trauma, and mourning constitutive features of the linguistic process itself, and his continual critique of an "aesthetic ideology" of totalization, organicism, full rootedness, and the elimination of difference—in brief, the illusory realization of the imaginary—may in certain limited and problematic ways be read as applicable to the assumptions of the Nazi movement. I would also note that the undoing of the binary oppositions, while perhaps more marked in Derrida than in de Man, has been a crucial aspect of deconstruction in general and is very important for the critique of a scapegoat mechanism that resists internal alterity, is intolerant of mixed or hybridized forms, and requires a fixed, pure, and decisive divide between the integral self and the other.[26]

Any translation of this passage, indeed, any attempt to explicate its obscurity, would violate one of the principles of deconstructionism: Obscurity is supposed to be a sign of profundity, and, as such, is preferred over clarity.[27] Thus, to attempt to give a coherent account of deconstructionism requires one, like it or not, to enter a bizarre world where meaning is meaningless, where "all interpretation is misinterpretation," where words have no referents, where (to bring this to an end) a dog is not a kind of barking animal but a "concept."

As explained by de Man himself, deconstructionism is a way of reading that claims to be superior to other modes of literary criticism, because it is more cognizant of the problem of language and, therefore, of reading. "De Man," according to Geoffrey Hartman, one of his most devoted partisans, "always asks us to look beyond natural experience or its mimesis [its imitation or representation in a work of art or literature] to a specifically linguistic dilemma," and that dilemma derives from our inability to control "the relation between meaning and language."[28] The fact that it does not, and cannot, convey meaning in any objective sense is, de Man says, "the distinctive curse of all language." A "text" does not convey its author's meaning; it has its own "textuality," independent of the author. A work of literature cannot be "reduced to a finite meaning, or set of meanings," which means that the critic's task is not to elucidate but to interpret; in a way, the critic's interpretative skills are more important than the work (or "text") being read. "And since interpretation is nothing but the possibility of error, by claiming that a certain degree of blindness is part of the specificity of literature we also reaffirm the absolute dependence of the interpretation on the text and of the text on the interpretation."[29] In effect, there is no meaning, there is only interpretation—or as Gertrude Stein said of Oakland, "There's no there there"—and the more idiosyncratic the better. Like some other modern critics, deconstructionists treat a work of literature the way a figure skater treats ice: as a surface from which to launch their linguistic versions of camels, toe loops, and double axels. Put otherwise, criticism is exalted over literature, or readers over authors, and, according to one deconstructionist, whereas the history of criticism used to be part of the history of literature, "now the history of literature is part of the history of criticism."[30]

As explained by Hartman (quoting de Man),

> The fields of critical philosophy, literary theory, and history have an interlinguistic, not an extralinguistic, correlative; they are secondary in relation to the original, which is itself a previous text. They reveal an essential failure of disarticulation, which was already there in the original. They kill the original, by discovering that the original was already dead. They read the original from the perspective of pure language [reine Sprache], a language that would be entirely free of the illusion of meaning.[31]

Translated, this means that what is written by the critic is related ("interlinguistically") to the work being criticized, but neither the work nor the criticism is related to anything in the world outside language. Language is not about anything except other language. This is true of a Shakespeare play, a Wordsworth poem, the Declaration of Independence, the Constitution of the United States, or a popular potboiler. As one deconstructionist admitted, even newspapers and almanacs can be deconstructed.

To say that nothing written has an "extralinguistic correlative" means that nothing written refers to, or is related to, anything existing outside the "text"; it means that love, friendship, and fidelity; envy and jealousy; justice, injustice, slavery, tyranny, and tolerance; natural rights and constitutional wrongs; all the things written about by poets, playwrights, philosophers, historians, statesmen, and Founders, are merely words, words without correlatives other than other words; it means—here I quote Roger Kimball—that "the atrocities we read about are merely literary phenomena, referring not to the sufferings of real people, real 'originals,' but only to a 'previous text'!"; it means that neither Matthew Arnold nor anyone else can speak of "the best which has been thought or said in the world" because there is no basis for such judgments, no basis for criticism.[32] There is nothing outside the text, and above all, as Allan Bloom put it, there is nothing higher. "This," he said, "is the final step in making modern man satisfied with himself."[33] The only thing the humanities can say to him is what the students were saying in the sixties: "Do your own thing."

Deconstructionism had its critics in the academy, but it ceased to be the reigning mode of critical analysis for another reason. It was discredited largely because de Man was discredited. In 1987, it was revealed (first in the pages of the *New York Times*)[34] that he had been a Nazi collaborationist

during the German occupation of Belgium, having written one hundred and seventy articles for the French-language *Le Soir* and ten others in *Het Vlaamsche Land*, a Flemish-language daily.[35] What is of interest here, because it speaks volumes about the condition of the contemporary university, is how the academy responded to these revelations.

De Man had made no mention of his Nazi connections when he came to the United States in May 1948, and it is easy to understand why. His benefactor, novelist and critic Mary McCarthy, and his academic colleagues, first at Bard College, then at Harvard, Columbia, Johns Hopkins, Cornell, and Yale, could not have been expected to welcome him had they known of his Nazi connections. Communism is one thing, but being pro-Nazi, then and now, puts one beyond the pale. And, although many of the leading figures in the fields of comparative literature and literary theory were to deny it, some of them to excuse it as a product of youthful innocence, de Man had been pro-Nazi and, so long as the Germans were winning the war, had made no effort to conceal it. On the contrary, he had openly expressed his admiration of Hitler, had supported his war and his program; like Hitler, he had looked forward to a Europe without Jews.

He addressed the Jewish question in a *Le Soir* article of March 4, 1941, entitled "Les juifs dans la littérature actuelle" ("The Jews in Contemporary Literature"), at the end of which he proposed his own version of Hitler's "final solution." Modern literature, he wrote, has not been "polluted" by Jewish influence because Jewish writers, especially in France, have always been second-rate, but the Jews were at least partly responsible for the decadence of European political life. Thus, by banishing them to a "Jewish colony, isolated from Europe," the political problem could be solved without any "deplorable consequences for Western literary life." Banishing writers of only "mediocre value" would have the additional benefit of allowing Western literature to continue to develop or evolve "according to its own laws."[36]

In the October 28, 1941, edition of *Le Soir* he, like the notorious Martin Heidegger, rejected any attempt to distinguish between Germany and Hitlerism. Their similarity, or "closeness," he wrote, was evident from the beginning, and the war would only make it clearer that Hitler spoke for Germany; the war would unite "the Hitlerian soul and the German soul, making them into a single and unique power." He said this

> is an important phenomenon because it means that one cannot judge the fact of Hitler without at the same time judging the fact of Germany, and that the future of Europe can be foreseen only within the framework of the possibilities and needs of the German spirit. It is not a question of a series of reforms, but, rather, of the definitive or final emancipation of a people who, in turn, are called upon to exercise a hegemony in Europe.[37]

Question: From whom or what were the German people (and after them the people of Europe) to be emancipated?

In his essay "On the Jewish Question," Karl Marx had argued that the "emancipation of mankind from *Judaism*" (italics in original) depended on the "emancipation of the Jews" from Judaism—or, as he put it in the last line of the essay, "The social emancipation of the Jew is the emancipation of society from Judaism." It might be said that Marx was one of the first to think actively about a solution to the "Jewish question," or, as it came to be called, the "Jewish problem"; but, as he was later to say, mankind poses for itself only such tasks as it can solve, and because he thought that, at the time, mankind had no solution in hand, he was content to wait until the Jews ceased to be Jews. Not being content to wait for that to happen, Hitler devised a solution and, in his own way, so did Paul de Man.

As might have been expected, these revelations of his Nazi sympathies created a public scandal, but not among de Man's academic admirers. The charges against him were said to be "groundless" (Rodolphe Gasche); the fact that his "writings during the occupation contain certain disturbing statements and positions with no parallel in his other writings before or after the occupation makes it difficult to read his newspaper articles as straightforward expressions of deeply held beliefs" (Ian Balfour); it is impossible to "understand what this allusion to 'a Jewish colony isolated from Europe' meant at that moment" (Jacques Derrida); "Although [de Man] grants the maximum attention to the role that Germany or 'German genius' has played or ought to play in the destiny of Europe, although he recalls constantly the necessity of understanding thoroughly the history of the German nation in order to understand Hitlerism, although he is vigilantly opposed to the commonplace and the 'lazy and widespread solution' that comes down to 'supposing an integral dualism between Germany, on

the one hand, and Hitlerism on the other [and] although his analysis leads him to judge German 'hegemony' in Europe to be ineluctable, this diagnosis seems rather cold and far removed from exhortation" (Jacques Derrida); "De Man's 'dirty secret' was the dirty secret of a good part of civilized Europe. In the light of what we now know, however, his [later] work appears more and more as a deepening reflection on the rhetoric of totalitarianism" (Geoffrey Hartman); "We are not now, and, in all likelihood, shall never be . . . in the position of being able to pass judgment on Paul de Man" (Leon Roudiez); de Man's so-called "collaborationist" journalism was "simply a job" (Fredric Jameson).[38]

Not content simply to defend de Man, his friends and intellectual neighbors proceeded to subject his academic critics (and there were many) to a torrent of abuse. To cite only the most extreme example, Northwestern University professor Andrzej Warminski accused them of not being able to read, of deliberate misrepresentation, of "stupidity," of being sick, of being philistines, of being primarily committed to "the institution and institutional values and criteria," which, they thought, were being threatened by de Man and "anyone with intellectual values (which, by the mere fact of being intellectual values always represent a potential threat to the institution and its creatures)." But, he went on, even this is not enough to explain the "hysteria" provoked by the revelations. "What could make so many of these creatures crawl out from under the rocks of their pathologies?" To this he attached the following footnote: "Anyone who thinks that the reptilian figure here is exaggerated should read some of the slime that has passed for [academic] 'journalism' these last months."[39] One might well ask what it was that caused him to crawl out from under the rocks of his pathologies.

But there is a nonpathological explanation for Warminski's anger, if not for the way he expressed it. He and his friends saw the revelations and the ensuing attacks as an attempt by the bourgeois "establishment" to discredit not only Paul de Man but also his way, which was their way, of doing literary criticism. By responding as they did, however, they disclosed the intellectual and moral bankruptcy of deconstructionism, with the result that few literary theorists today are willing to be associated with it.

The assault on the universities, begun by the radical students of the sixties, was continued in a more subtle fashion by the deconstructionists in the eighties. Unlike the students, they did not strike, riot, occupy buildings, or

take up arms; nor, as one of the Berrigan brothers was accused of doing—even as he was nominated for a Nobel Peace Prize—did they engage in a plot to kidnap Henry Kissinger and blow up the heating system of federal buildings in Washington. (The case ended in a mistrial.) All they did was teach (and teach the next generation of teachers); but what they taught was that the universities have nothing of importance to teach. Matthew Arnold would have had the universities teach the books containing the best that has been thought and said in the world, and Thomas Jefferson wanted them to teach the Declaration of Independence and *The Federalist*, the "best guides [to the] distinctive principles of the government of the United States."[40] But, according to Paul de Man, there is no best thought and no best guide because there is no text; there is only interpretation. As he said, "the distinctive curse of all language" is that it cannot convey meaning in any objective sense.[41] Thus, about those things that mattered most to Arnold and Jefferson—all the things written about by poets, playwrights, philosophers, historians, statesmen, and Founders—the humanities, indeed the universities, would have nothing to say.

In a way, this is what the students were complaining about in the sixties: the irrelevance of the curriculum. For some of them, the solution was to remake the university into a kind of countercultural welfare agency, and the extent of their success is evident in the prevalence of black studies, women's studies, and multicultural programs. For the others—the ones searching for "authentic values," in which phrase there is, perhaps, a hint of a longing for an education of the sort proposed by Coleridge and Company—what does the university offer? In the humanities, it offers a politicized curriculum, the core of which is antirationalist, antihumanist, and antiliberal.

It used to be thought (and in some quarters is still thought) that Shakespeare is the greatest of our poets, the playwright who shows us, for example, the meaning of love and friendship, envy and jealousy, the character of good rulers and the fate of tyrants. In a word, he shows us human beings just as they are, a mixture of the high and the low; or as someone said, "His poetry gives us the eyes to see what is there." The political plays especially meant something for Abraham Lincoln. "Some of Shakespeare's plays I have never read," he said, "while others I have gone over perhaps as frequently as any unprofessional reader. Among the latter are Lear, Richard

Third, Henry Eighth, Hamlet, and especially Macbeth. It is wonderful."[42] But for the New Historicism, currently the dominant movement in the field of Shakespeare studies, his plays simply reflect the prejudices of his day. They are said to be worthy of study only because in them can be found the seeds of racism, sexism, capitalism, classism, all the evils that are said to characterize bourgeois society. Reading Shakespeare in this way has the effect of reducing his stature in the eyes of the students. "Safely entrenched in their politically correct attitude," writes Paul Cantor, a critic of the New Historicism, "students are made to feel superior to Shakespeare, to look down patronizingly at his supposedly limited and biased view of the world."[43]

For the students looking for something "wonderful," for something not available to them in the bourgeois world from which they come and to which they must, willy-nilly, return, these antihumanists have nothing to say.

20

Trashing Bourgeois America

I recall a faculty party at Cornell, the day after the annual Fourth of July celebration at the university football stadium. The wife of an economics professor, when asked if she had enjoyed the fireworks, replied, "Yes, but I could have done without all the flag-waving." This reminded me of that familiar old song—familiar in some circles, at least—"If you don't like my peaches, why do you shake my tree?"

As in Ithaca, New York, so, apparently, in Ann Arbor, the home of the University of Michigan. The following statement comes from an article by a professor of English, entitled, "Dissing the Middle Class":

> [Inhabited largely by professors], Burns Park is hardly a typical American middle-class neighborhood, as evidenced by the practice of one contentious colleague of flying the American flag on patriotic holidays so as, he claims, to annoy his neighbors.[1]

This phenomenon is not peculiar to America, nor to this time. Indeed, some sixty-odd years ago, George Orwell remarked much the same thing in England. "It is a strange fact," he said, "but it is unquestionably true, that almost any English intellectual would feel more ashamed of standing to attention during 'God save the King' than of stealing from a poor box."[2] What accounts for this?

Orwell attributed it to what he said was the fact that English intellectuals were ashamed of their own nationality. As to that, he would, of course, know better than I, but it seems to me that *shame* alone does not explain it, certainly not shame as Hobbes defined it—as grief caused by "the discovery of some defect of ability."[3] It was surely not because they

grieved for England that four of them—Guy Burgess, Donald MacLean, Kim Philby, and Anthony Blunt—spied for the Soviet Union. Orwell was probably closer to the truth when he said English intellectuals were Europeanized, taking "their cookery from Paris and their opinions from Moscow."[4] Of course, a Paris *crème caramel* rather than an English suet pudding is understandable, but why Moscow's Marxism rather than Britain's liberal democracy? The answer has something to do with the fact that, especially after Adam Smith, liberal democracy became bourgeois democracy.

Just as it was in England that the idea of liberal democracy was born—I refer, of course, to Thomas Hobbes and John Locke—so it was in England that opposition to, or dissatisfaction with, liberal democracy was first manifested. By this, I do not mean the champions of the old or traditional political idea, monarchy or divine right; Locke presumed to have disposed of that in the first of his *Two Treatises of Government*. I have in mind certain poets who defended what they called *culture*, and foresaw that John Locke's, and after him Adam Smith's, principles would lead to a commercial society, a society with no secure place for culture as they defined it, in a word, a "bourgeois" society.

Although not the first to use the term as it is now employed, the Scotsman Thomas Carlyle (in the 1860s) spoke of "culture" as the body of arts and learning separate from the "work" or "business" of society. This definition has the merit of reflecting (and that very clearly) the problem that gave rise to the "culture" movement in the early nineteenth century. Carlyle was preceded by the poets Coleridge, Keats, and, especially, Wordsworth (who, in his role as poet, saw himself as an "upholder of culture" in a world that had come to disdain it); and by Shelley (who said that society could do without Locke, but not without Dante, Petrarch, Chaucer, and Shakespeare); and by John Stuart Mill, for whom "culture" meant the qualities and faculties that characterize our humanity, or those aspects of our humanity that he foresaw might be absent in a liberal democracy. His famous essay, *On Liberty*, was written with this in mind.

But it was the great English historian and man of letters, Thomas Babington Macaulay, who explained the source of what the poets saw as the problem. I quote from his essay on Francis Bacon, where he compares the old philosophy with the new:

> To sum up the whole, we should say that the aim of the Platonic philosophy was to exalt man into a god. The aim of the Baconian philosophy was to provide man with what he requires while he continues to be a man. The aim of the Platonic philosophy was to raise us far above vulgar wants. The aim of the Baconian philosophy was to supply our vulgar wants. The former aim was noble; but the latter was attainable.[5]

It was left to America to demonstrate the extent to which Macaulay and Bacon were right.

In 1776, we laid the foundation of a regime that would secure our unalienable rights to life, liberty, and the pursuit of happiness. What we did with these rights was up to us; more to the point, it was left to each of us to define the happiness he has the right to pursue. He might—we might—seek eternal salvation in another world, or, on the other hand, find happiness by acquiring the goods of this world. The government was to have nothing to do with this, other than to provide the conditions making it possible. This was to be done, in the one case, by guaranteeing liberty of conscience, and, in the other, by securing the property right—or as James Madison put it in the celebrated *Federalist* 10, by securing the "different and unequal faculties of acquiring property." He went so far as to say that this was "the first object" of government.

To repeat: Guided by the new political philosophy, we established a commercial republic, peaceful and prosperous, and peaceful, in part, because it is prosperous. The Constitution secures our rights, including the right to be—or not to be—cultured. The choice is ours. We can spend our leisure time reading the Bible, Petrarch, Dante, Shakespeare, and listening to the music of Bach, Mozart, Beethoven, or, on the other hand, by going to the movies, watching MTV or, thanks to modern science (which is protected by the Constitution—see article 1, section 8, clause 8), gaping at Internet porn. We enjoy the right to do the one or the other. As someone once said, the Constitution gives rights to vulgarity as well as to culture.

What began in nineteenth-century Britain as a serious critique of the new liberal democracy became, in twentieth-century America, a contemptuous "bourgeois-bashing," almost a way of life for some of our campus radicals. But if not American liberal democracy, with all its vulgarity, what?

What's the alternative? Our intellectuals might, with reason, prefer Parisian *crème caramel* to American apple pie, but they cannot, with reason, prefer Moscow's Marxism to America's liberal democracy, if only because Marxism suffered an un-Marxist—that is, unhistorical—death in Moscow.

Orwell, to get back to him, accused the intellectuals of his time of being nonpolitical, of living in the world of ideas and having "little contact with physical reality." The same might be said of some of ours—Martha Nussbaum, for example, a Harvard classicist but now a professor of law, as well as of ethics, philosophy, and divinity (a veritable polymath), at the University of Chicago, and author of the lead essay in a book entitled, *For Love of Country*. It ought to be entitled *For Love of Nowhere*.

Nussbaum is a cosmopolitan, and an advocate of what she calls cosmopolitan education, according to which students should be taught that "they are, above all," citizens not of the United States, but, instead, "of a world of human beings." Patriotism, as we ordinarily understand it, is a problem, she thinks, because it leads to parochialism, or "partisan loyalties." "Only by making our fundamental allegiance to the world community of justice and reason do we avoid these dangers."[6] But where is this world community to which we can pledge our allegiance? The United Nations?

In fact, of course, this country, however numerous its imperfections, is now, as Abraham Lincoln said it was in 1862, "the last, best hope of earth." It is this because the cause of justice, equality, tolerance, human rights—all the values Nussbaum favors—depends not on the so-called world community—Iran, Iraq, Saudi Arabia, North Korea, China?—but absolutely on this country and the willingness of its citizens to defend it against its enemies. She fails to appreciate this country and the fact that there is nothing narrowly partisan about its patriotism.

Lincoln made this clear in his eulogy on Henry Clay. Clay, he said, "loved his country partly because it was his own country, but mostly because it was a free country; and he burned with a zeal for its advancement, prosperity and glory, because he saw in such, the advancement, prosperity and glory, of *human* liberty, *human* right and *human* nature" (emphasis added).[7]

In closing, I refer to an article by John Judis, which appeared in *The New Republic* in 2000.[8] He had attended a conference in New York City on "globalization and independent politics," sponsored by the Nation Institute,

George Soros's Open Society Institute, the Carnegie Institute, Barnard College, Columbia University, and the City University of New York—in other words, a conference of academics. As one might expect in such a gathering, the speakers accused America of being racist, sexist, imperialistic, and, generally, a place where no decent person would choose to live. Among the speakers was a professor of politics at one or another branch of the University of California, who said the "two-party system is a sanctuary for middle-class, white-skin [that is, bourgeois] privilege." Not to be outdone, a female member of the audience repeatedly complained of "brown tap water."

Judis said he had intended to stay for Ralph Nader's luncheon address, but, instead, packed his suitcase, headed for Penn Station, and caught the first train back to his quiet home in the Washington suburbs where, he said, people think "white-skin privilege" is a kind of hand cream, and, when faced with "brown tap water," call the plumber. And also, I would add, where they love this country and, when necessary, are prepared to take up arms in its defense.

Part IV

Addendum: Personal Matters

Preface

The two chapters in this section have little or nothing to do with constitutional democracy; they are, instead, tributes to friends who in very different ways played major roles in my life. I met Frieda Lawrence soon after World War II at a time when I had illusions as to what I was going to do with my life; she rid me of those illusions. I met Herbert Storing soon after I entered graduate school and had begun the serious study of American politics. In the course of time, I came to recognize that he was an exceptional teacher and scholar.

21

Remembering Frieda Lawrence

Wind whispers through the pinon trees dotting the 160-acre mountain-top ranch that inspired writer D. H. Lawrence. . . . The scene is peaceful, yet melancholy: the property . . . is falling apart.

—*Washington Times*, March 27, 1998

It was a lovely place, that ranch, near (but not at) the top of a mountain a few miles from Taos, and so inaccessible that no one was likely to come upon it inadvertently. My wife and I spent our honeymoon at it in 1951, when Lawrence's wife Frieda still owned it. Alone, except when Frieda and Angie would come up from Taos for lunch or dinner—Angie was Angelo Ravagli, the model for the gamekeeper in *Lady Chatterley's Lover*, and soon to become Frieda's husband—we could sit on the wooden steps of the "big house" and look over the sage-brushed desert spread out below us, with the Rio Grande visible (and in that clear New Mexico air almost always visible) in the distance. And we could walk for hours along the crude aqueduct the Indians had built to carry water to the ranch—and to the concrete swimming pool (built by Angie) in which we could swim, naked as jaybirds. It was a perfect place for a honeymoon.

It had been owned by Mabel Dodge, a pretentious New Yorker with lots of money, who came to Taos, married a local Indian named Tony Luhan (whom I never heard utter a word), and settled in to become a patroness of the arts. The Lawrences acquired it from her in exchange for the manuscript of *Sons and Lovers*. I don't know what Mabel did with the manuscript, but Frieda, sole proprietor after Lawrence's death, left the ranch to the University of New Mexico, which, as the *Washington Times* tells us, allowed it to "decline from asset to eyesore."

I first met Frieda in 1946 at the Sagebrush Inn outside Taos where, with a friend from my wartime Navy days, I was working as a waiter and she had come to dine. That meeting led to an invitation to tea at her Taos home, and then to a visit, the first of many, at the ranch. There, usually at supper, she would ask us about the Navy and the war, and, in return, speak of her "wonderful days with Lawrence," of his precarious health, of his difficulties with publishers and editors, of their life in Germany, Italy, the south of France, Australia, and in England during the First World War, when she, born Frieda von Richthofen and cousin of the "Red Baron" Manfred von Richthofen, was suspected of being a German spy. And she spoke of her childhood at Metz where, after the Franco-Prussian War, her father, a German nobleman, served in some official capacity, and, sitting on the wall surrounding his estate, she and her two sisters would toss pears and apples from their orchard to the soldiers marching by; and of her days in a French convent school where she "did not learn very much" and the nuns would say, as she came dashing into class with her Hessian boots, "Toujours doucement, ma petite Frieda."

She was not petite when I knew her; in fact, she was rather lumpy and could have been mistaken for a peasant—walking around in her bare feet and an apron, feeding the chickens, answering questions with a throaty German "*Ja*!" (or when speaking Italian with Angie, "*Si*!"), and roaring with laughter when she came upon a laundry list, prepared by Angie, that included, among the items, "4 shits." Still, there was something of a queen or princess about her. Once, when some self-important Texas visitor to the ranch had bragged about his ancestors, she replied, "Mine were Silesian kings." And so they were. Her younger sister Johanna (Nusch, as Frieda called her) was lady-in-waiting to the empress queen of Kaiser Wilhelm II, and once, by way of declaring their love affair at an end, slipped off a pearl necklace given her by her suitor and casually dropped it into the Spree (or Seine, Tiber, or Thames). To hear Frieda tell it, Nusch had lovers everywhere, even (but not in her salad days) Hot Springs, Arkansas. This, because it says something of importance about Frieda, is a tale worth repeating.

In 1949, on Frieda's seventieth birthday, Nusch, at least sixty-five but doing a good job of concealing it, came to the ranch and announced that she had stopped at Hot Springs on the way and had met a "nice young man" there. Indeed, she continued, she had invited him to come to Taos and—

hoping her sister would not mind—had told him Frieda was her mother. Frieda thought this hilarious; she warned me not to give the game away.

After lunch on most days, Frieda would retire to her bedroom to read and take a brief nap, emerging with her impressions of what she had read. Writers, for her, were divided between those who had "*zut*" and those who didn't; somehow one knew what she meant. Nietzsche had "*zut*," according to Frieda, and, of course, Lawrence had it in abundance; but Aldous Huxley, though she loved him dearly, did not. She loved to read Lawrence's poems aloud, and subsequently recorded them; I have a copy of the recording still. A room in the "big house" was filled with his paintings, one of them showing a group of nuns looking furtively at a naked shepherd boy asleep under a tree.

Frieda enjoyed playing the piano, especially if we sang along with her; her specialty was a folk song that had been a favorite among the German soldiers at Metz, "*Wenn ich zu meinem Kinde geh*" ("When I go to my child"). Considering the fact that no tuner ever braved the rutted road to the ranch, the piano was in surprisingly good condition. Frieda was not the only one who thought so; to cite an even better authority, Leonard Bernstein did, too.

Bernstein visited the ranch in the summer of 1948 because Frieda had invited the poet Stephen Spender to spend some time there, and along with Spender came Bernstein and Bernstein's younger brother. For some reason—I never heard her try to play it—Frieda owned the complete score of Mozart's opera "Don Giovanni," and, seeing it, Bernstein immediately sat down and began to play and sing his way through it. I thought this extraordinary at the time, but Frieda, who had spent the better part of her life among unusually talented people, took it in stride. As I recall, Spender's crew lasted only a week, probably because, alone up there, they got tired of cooking for themselves or, in Bernstein's case, of having to do without the news from New York.

Frieda made it a practice to take fresh flowers and cedar and pine boughs to the tiny chapel where Lawrence's ashes are buried—the *Washington Times* refers to the place as a mausoleum. Angie, an expert mason, had built the chapel, and Georgia O'Keeffe, who lived not far away and was a great friend of Frieda's, had painted one of the pictures that hung in it. Famous people from around the world had entered their names in the registry that Frieda kept there.

There are interesting stories involving the chapel, but to tell one of them I have to introduce another inhabitant of Frieda's world, the Honorable

Dorothy Brett, daughter of the Viscount Esher (confidant of King Edward VII) and sister of the Ranee of Sarawak (now a part of Malaysia but, before World War II, ruled by Sir Charles Vyner Brooke, the Ranee's husband and the third and last of the Rajahs). Brett was a painter, and a rather good one, too; she lived in Taos across the road from Frieda, popping in on her at least once a day. She was therefore well placed to tell Mabel Dodge what Frieda was doing, and, of greatest interest to Mabel, what famous person—for instance, the poet William Carlos Williams—had visited Frieda without coming to visit her. To say the least, Mabel was jealous of Frieda and, beyond that, had persuaded herself that she better appreciated Lawrence's genius and would make a better custodian of his ashes.

Lawrence had died in the south of France, and, some years before my time in Taos, Frieda and Angie had gone there to recover the ashes. Arriving home, they were greeted by Brett, who asked, "Where's Lawrence?" It turned out that on their return to Taos they had stopped for a cup of coffee, and the ashes had been left on the counter. (Angie was dispatched to fetch them.) This proved to be the last straw for Mabel. Inviting Frieda and Angie to dinner, she instructed her husband Tony and some friends of his from the Indian pueblo at Taos to go up to the chapel and steal the ashes. They probably would have succeeded, had Brett, who was privy to the plot, not warned Frieda at the last moment.

In 1949, persuaded—by Frieda, among others—that I would never be a writer (I lacked "*zut*"), I left Taos for graduate school and became, of all things, a political scientist. I don't know about Mabel, but Frieda died in 1956, Brett in 1975, and my wife and I last saw Angie in 1966 on our way to Portofino in Italy. He had returned to his native Spotorno, near Genoa, but it was sadly obvious that he no longer belonged there and had nothing to do. On the other hand, without Frieda and the world she had built around her, he would have had nothing to do in Taos, either.

As for the ranch? I suspect that, after consulting some smart lawyers and developers, the University of New Mexico will turn it into still another of the area's ski resorts. What they will do with the chapel is a problem, though; it is too small for a bar, and a ski resort is no place for a shrine.

22

Remembering Herbert Storing

Almost thirty years have passed since Robert Goldwin called from Washington and said that Herbert Storing had died. I must have uttered a cry, because my wife, who was across the room, rose up startled; I then broke into tears. How else does one hear the news of the death—a sudden and unexpected death—of a child, for example, or, in this case, a dear friend?

Storing and I first met in 1950 as beginning graduate students in the political science department at the University of Chicago. He came from Colgate University, where his father was a professor and, for a while, had been acting president, and I from Reed College in Portland, Oregon, by way (for one year) of the London School of Economics and Political Science, where I learned little, other than to love London. We lived in different units of graduate student housing (converted Quonset huts) on the Midway across from the main campus. Because our wives, by chance, were away on the same night each week, one at work, the other at school, Storing and I would eat our evening meal together, one week at his place, the next at mine, but always discussing what we had learned that day or week. We studied constitutional law with Professor Herman Pritchett and political philosophy with Professor Leo Strauss, so there was much to discuss. These weekly suppers were, I believe, the real beginning of our friendship.

The Storings owned a property on Hatch Lake, a few miles from Colgate in Hamilton, New York. There were several houses on it. Nothing fancy about them, but they were capable of accommodating visiting friends, particularly, on several occasions, those of us from Chicago and our families. (They also had a bad-tempered cat named—for some reason—Walter.) Down by the dock, there was a very small structure—built, I suppose, to

store life jackets and other boating paraphernalia—which Storing used as a summer office, exclusively for the reading of PhD dissertations. It seemed to me that he must have served on at least half of the department's dissertation committees, a disproportionate number as chairman. At any rate, I have a memory of manuscripts piled on his desk awaiting his attention. Unlike some professors I have known, Storing read them all with great care. His students will attest to this.

In July 1976, he organized a Bicentennial symposium at Colgate where we Chicago friends each gave a paper on some aspect of the Declaration of Independence. (Goldwin has a photograph of us sitting in a line on the platform.) That meeting was especially memorable because of the symposium, and also because of the Israeli raid and rescue at Entebbe, news of which reached us early in the morning of July 4. It was also the last time we were all together: Storing, Goldwin, Martin Diamond, Robert Horwitz, Robert Scigliano, and I, all professors, except Goldwin, who at the time was in the White House as special assistant to the president; and all, except Storing, who was younger than the rest of us, World War II veterans. (His Army service began in 1946. As he told it, he was a sort of itinerant bugler, blowing "taps" at veterans' burials, or reburials.) His death the following year (September 9, 1977) put an end to these summer gatherings and, of course, to much else of greater consequence: his teaching and scholarship.

Storing was one member of our Chicago group whose scholarship made a difference and, for that reason, will be remembered. This is especially true of his seven-volume study, *The Complete Anti-Federalist*, which was described by the *New York Times* reviewer as "a work of magnificent scholarship" and its publication a "civic event of enduring importance."

Except for a couple of years in London as a Fulbright Scholar, and an occasional visiting professorship, almost all his academic time was spent at the University of Chicago, first as graduate student, then, from 1956 to 1977, as assistant, associate, and professor of political science. He had no interest in going elsewhere; that changed when the University of Virginia contacted him respecting a position as professor and head of a new program on the American presidency. I learned about this when the chairman of the Virginia department asked me to assess his qualifications. This is the substance of what I wrote:

Dear ____:

I know of no one who is better qualified to occupy the position you describe than Herbert Storing; in fact, I cannot imagine anyone who would be better qualified for it. Having begun in this immoderate fashion, I owe it to you to admit that Storing and I are close friends, and have been ever since 1950 when we first met as beginning graduate students at the University of Chicago, and that, therefore, I may not be an impartial judge. On the other hand, I would have to insist that the closeness of our relationship allows me to speak with unusual authority; I know him, I know his work, I know his students, I know his capacities—and, knowing all this, I know him to be the model of a university professor.

You know, or will quickly come to know, that the position you describe and seek to fill is exactly suited to his interests. The American constitutional system is his field; he has taught it and almost every aspect of it, and he has written about its Founding, and now proposes, in fact, to turn his attention to the institution of the presidency. It is also exactly suited to his talents. You want a scholar; Storing is one of the very few true scholars I know: he is thorough, comprehensive, unbiased, uncompromising in his search for all the evidence that research can uncover. You also want a profound man; Storing is the most profound man I have encountered in the field of American studies: He is a serious thinker, not an intellectual, he understands the deepest questions and problems involved in our politics, and he elucidates them with a clarity that is unsurpassed. You also want a teacher; Storing is an incomparable teacher. That, quite simply, is the unanimous judgment of all the students I have sent to him over the years. He tries to teach, and, therefore, never propagandizes; he listens to students, but never panders to them—he is too dignified, too much the man ever to do that or ever even to wish for popularity—and he has less of what we recognize as vanity than anyone I know. And he has an amazing capacity to gain

> the respect of an audience and even, when what he is discussing is contentious, to disarm the potentially most hostile of critics. I recall an astonishing performance at Cornell about ten years ago when a student group, which had been attracted to him through his essays on Booker T. Washington and Frederick Douglass, invited him to address a university audience on the subject of black power. There was a huge turnout, including, as one could have expected, many who denied on principle that any white man had a right to discuss the topic. Well, he made it an educational event by teaching everyone who was educable, gaining the respect of almost everyone, and angering no one. In the circumstances of that time and place it was a remarkable achievement, but altogether characteristic of him. In his quiet and careful way, he demonstrated that he knew more and had thought more deeply about the racial problem in the United States than anyone present, including, of course, all those who professed it either academically or politically.
>
> One more word, this on his scholarship: The Chicago Press is publishing his seven-volume edition of the *Anti-Federalist Papers*, one of the seven being his essay on the ratification debates. I read—in fact, studied—this two years ago, and I can confidently say that with its publication he will be recognized as a preeminent authority on the Founding period. You should not expect a volume a year from him on the presidency—that is not his way—but you can expect work that will gain him the same sort of recognition in this area.
>
> I close by repeating what I said at the beginning: I know of no one who is better qualified for the position than Storing. He's the best.

He was appointed, of course, and moved with his family to Charlottesville, but died (on the handball court) before he had begun to teach. He was forty-nine years old.

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Notes

Introduction

1. *The Federalist* (or *Federalist Papers*) began as a series of letters, eighty-five in number, which were published in New York City newspapers to persuade the people of the state of New York to ratify the Constitution drafted in Philadelphia during the summer of 1787. "Written with a haste that often bordered on the frantic," as the editor of a modern edition of the work says, and "printed and published as if it were the most perishable kind of daily news," *The Federalist* is, nevertheless, "the most important work in political science that has ever been written, or is likely ever to be written, in the United States." Clinton Rossiter, ed., *The Federalist Papers* (New York: Penguin Books, 1961), vii. In addition to its importance in the realm of political science, or theory, it is understood to be the most authoritative commentary on the Constitution; as a result, it is widely used as a college text and is probably one of the few books that can be found in most American libraries, including those located overseas.

2. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

3. The majority opinion was written by Justice Sandra Day O'Connor. She did much the same thing—that is, play ducks and drakes with a statute—in a 1987 civil rights case, where she persisted in reading the statute so as to permit "what its language read literally would prohibit," even though, as she admitted, Justice Scalia (in his dissenting opinion) had pointed this out "with excruciating clarity." *Johnson v. Transportation Agency*, 480 U.S. 616, 647 (1987).

4. Walter Berns, *Making Patriots* (Chicago: University of Chicago Press, 2001), x.

5. Thomas Jefferson to Roger C. Weightman, 24 June 1826, in *Thomas Jefferson, Writings*, ed. Merrill D. Petersen (New York: Library of America, 1984), 1516–17.

Preface to Part I, Constitutionalism

1. Alexis de Tocqueville, *Democracy in America*, ed. Phillips Bradley (New York: Vintage Classics, 1945), 325–26.

Chapter 1: Ancients and Moderns: The Emergence of Modern Constitutionalism

1. *Constitution of Athens* (New York: The Hafner Library of Classics, 1950).

2. After this the story becomes truly bizarre. Pisistratus returned from exile when Megacles "picked out a tall and beautiful woman by the name of Phya . . . dressed her up so that she looked like the goddess [Athena] and brought her into the city with Pisistratus. And so, Pisistratus drove into the city on a chariot, the woman standing by his side, and the citizens fell down in worship and received him with awe." *Constitution of Athens*, 82.

3. *Constitution of Athens*, 4–5.

4. Aristotle, *Politics*, trans. H. Rackham (Cambridge, Mass.: Harvard University Press, 1932), bk. 4, 331.

5. Cicero, *On The Republic, On The Laws*, trans. Clinton Walker Keyes (Cambridge, Mass.: Harvard University Press, 1928), bk. 2, sec. 33, 58.

6. Polybius, *The Histories*, trans. W. R. Paton (Cambridge, Mass.: Harvard University Press, 1927), bk. 6, sec. 11, 11.

7. Cicero, *On the Republic, On the Laws*, bk. 3, 30.

8. Montesquieu, *The Spirit of the Laws* (New York: Hafner, 1940), bk. 11, ch. 6.

9. 8 Coke Reports, 107a, 118a (1610).

10. "The main object of the Whig party in the early part of the eighteenth century was to establish in England a system of government in which the will of the people as expressed by Parliament should be supreme, and the power of the monarch should be subject to the limitations it imposed." William Edward Hartpole Lecky, *History of England in the Eighteenth Century* (London: Longman, 1925), vol. 1, 2–3.

11. Thomas Paine, *Rights of Man* (London: Watts & Co., 1937), 36. First published in 1791.

12. Henry St. John Bolingbroke, "Dissertation upon Parties, Letter X" in *The Craftsman* (London: R. Francklin,1754), 108.

13. Francis D. Wormuth, *The Origins of Modern Constitutionalism* (New York: Harper & Bros. 1949), 42.

14. Shakespeare, *Richard II*, Act 2, Scene I.

15. In such a system, he said, "laws are to be supported only by their own terrors, and by the concern which each individual may find in them, from his own private speculations, or can spare to them from his own private interests. In the groves of *their* academy, at the end of every vista, you see nothing but the gallows." Edmund Burke, "Reflections on the Revolution in France," in *The Works of Edmund Burke* (London: G. Bell and Sons, Ltd., 1911), vol. 2, 350. The publication of the "Reflections" led him to be denounced by the English friends of the Revolution, some of them fellow Whigs, but Edward Gibbon thought it "a most admirable medicine against the French disease."

16. Edmund Burke, *The Works of Edmond Burke*, vol. 2, 308.

17. Ibid., vol. 2, 362.
18. Ibid., vol. 6, 146.
19. Ibid.
20. Ibid., vol. 2, 422.
21. Ibid., vol. 2, 306–7.
22. Ibid., vol. 6, 21.
23. Ibid., vol. 2, 333.
24. Ibid., vol. 3, 85.
25. Ralf Dahrendorf, "Can European Democracy Survive Globalization?" *National Interest* 65 (Fall 2001), 17–22.
26. Treaty on European Union, signed on February 7, 1992, title I.
27. Treaty of Amsterdam, signed on October 2, 1997, article 2.
28. ". . . Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have established their general liberty and independence." John Jay, *Federalist* 2.
29. Edmund Burke, "Speech on Conciliation with the Colonies," March 22, 1775, in *The Works of Edmund Burke*, vol. 1.
30. Both the federal and the various state constitutions are modern in this respect. The federal Constitution begins as follows: "We the People of the United States . . . do ordain and establish this Constitution for the United States of America." So compelling was this idea of a legitimate foundation of government that, in 1778, the people of Massachusetts, by a large majority, rejected a state constitution because, and only because, it was drafted by the legislature, not by the people. Then, in 1780, they voted in favor of a constitution because it was drafted in a convention of delegates chosen by the people.
31. Tocqueville, *Democracy in America*, introduction, 3–16.
32. *Federalist* 63.
33. Herbert J. Storing, ed., with the assistance of Murray Dry, *The Complete Anti-Federalist* (Chicago: University of Chicago Press, 1981), 224.
34. *Federalist* 49.
35. Felix Frankfurter, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 670 (1943). Dissenting opinion.

Chapter 2: The Illegitimacy of Appeals to Natural Law in Constitutional Interpretation

1. *Calder v. Bull*, 3 Dallas 386 (1798).

2. *Fletcher v. Peck*, 6 Cranch 87, 143 (1810).

3. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

4. Ibid., 511–12. Dissenting opinion.

5. Roscoe Pound, "Introduction," in *The Forgotten Ninth Amendment*, ed. Russell B. Patterson (Indianapolis: The Bobbs-Merrill Co., 1955), iii, iv.

6. Nature as guide or measure is, perhaps, best illustrated in this soliloquy spoken by the bastard son of the Earl of Gloucester (Shakespeare, *King Lear*, act 1, scene 2):

> Thou, Nature, art my goddess; to thy law
> My services are bound. Wherefore should I
> Stand in the plague of custom, and permit
> The curiosity of nations to deprive me,
> For that I am some twelve or fourteen moonshines
> Lag of a brother? Why bastard? Wherefore base?
> When my dimensions are as well compact,
> My mind as generous, and my shape as true,
> As honest madam's issue? Why brand they us
> With base? with baseness? bastardy? base, base?
> Who, in the lusty stealth of nature, take
> More composition and fierce quality
> Than doth, within a dull, stale, tired bed,
> Go to th' creating a whole tribe of fops,
> Got 'tween asleep and wake?—Well, then,
> Legitimate Edgar, I must have your land:
> Our father's love is to the bastard Edmund
> As to th' legitimate: fine word,—*legitimate*!
> Well, my legitimate, if this letter speed,
> And my invention thrive, Edmund the base
> Shall top th' legitimate. I grow; I prosper:—
> Now, gods, stand up for bastards!

7. Walter Berns, "Preserving a Living Constitution," in *Is the Supreme Court the Guardian of the Constitution*? ed. Robert A. Licht (Washington, D.C.: AEI Press, 1993), 34–45.

8. *Griswold v. Connecticut*, 515. Dissenting opinion.

9. *Roe v. Wade*, 410 U.S. 113 (1973); *Bowers v. Hardwick*, 478 U.S. 186 (1986).

10. Russell Hittinger, *A Critique of the New Natural Law Theory* (Notre Dame, Ind.: University of Notre Dame Press, 1987), 63.

11. John Quincy Adams, *Jubilee of the Constitution—a Discourse Delivered at the Request of the New York Historical Society . . . on the 30th of April 1839* (New York: Samuel Colson, 1839), 54.

12. John Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition* (New York: Sheed and Ward, 1960), 37–39.

13. John Locke, *Two Treatises of Government*, II, sec. 6. (Cambridge: Cambridge University Press, 1964).

14. Murray, *We Hold These Truths*, 53–54.

15. John Locke, "A Letter Concerning Toleration," in *Library of the Liberal Arts* (New York: Macmillan, 1950); Thomas Jefferson, "Notes on the State of Virginia," Query XVII, in *Thomas Jefferson, Writings*, 281.

16. Murray, *We Hold These Truths*, 299.

17. Ibid., 316.

18. Ibid., 305.

19. John Locke, *Questions Concerning the Law of Nature*, introduction, text, and translation by Robert Horwitz, Jenny Strauss Clay, and Diskin Clay (Ithaca, N.Y.: Cornell University Press, 1990), questions 4, 6.

20. Locke, *Two Treatises*, II, sec. 8–12, 87; Thomas Hobbes, *Leviathan*, *or the Matters and Powers of a Commonwealth Ecclesiastical and Civil* (Oxford: Basil Blackwell's Political Texts, 1960), 142.

21. Thomas L. Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke* (Chicago: University of Chicago Press, 1988), ch. 13–21.

22. Murray, *We Hold These Truths*, 307, 291, 37–39.

23. Jefferson, "Notes on the State of Virginia," Query XVII, in *Thomas Jefferson, Writings*, 285.

24. John Locke, *Essay Concerning Human Understanding*, ed. Peter H. Nidditch (Oxford: Clarendon Press, 1979), vol. 2, sec. 21, 55; vol. 1, sec. 3, 6; vol. 2, sec. 21, 42, 65, 55.

25. Locke, *Essay Concerning Human Understanding*, vol. 2, sec. 21, 43, 68; *Reasonableness of Christianity*, para. 245 ("pursuit of happiness"); *Two Treatises*, II, sec. 225 ("long train of abuses"); *Two Treatises*, II, sec. 230 (mankind "are more disposed to suffer").

26. James Wilson, in *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, ed. Jonathan Elliot (New York: Burt Franklin, 1888), vol. 2, 456. John Quincy Adams made the same point. The principles of the Declaration of Independence and the Constitution, he said, had been "especially expounded in the writings of Locke." Adams, *Jubilee of the Constitution*, 40. And, contrary to Murray, Adams says that "English liberties had failed them . . . the colonists appealed to the rights of man." Adams, *Jubilee of the Constitution*, 9.

27. "The Essex Result," in Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution* (Chicago: University of Chicago Press, 1987), vol. 1, 112–18.

28. *Federalist* 49 and 43.

29. *Federalist* 51; Pangle, *The Spirit of Modern Republicanism*, 118–19.

30. Ernest L. Fortin, "The New Rights Theory and the Natural Law," *Review of Politics* 44 (1982): 590–612. For the presuppositions, see Heinrich A. Rommen,

The State in Catholic Thought: A Treatise in Political Philosophy (St. Louis and London: B. Herder Book Co., 1945), 169–70.

31. See Leo Strauss, "Natural Law," in *International Encyclopedia of the Social Sciences*, ed. David L. Sills (New York: Crowell Collier and Macmillan, Inc., 1938), vol. 2, 80–90.

32. Hobbes, *Leviathan*, ch. 14; Locke, *Two Treatises*, II, sec. 87, 128–31.

33. Randy E. Barnett, ed., *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* (Fairfax, Va.: George Mason University Press, 1989).

34. *Annals of Congress*, 1st Cong., 1st sess., August 15, 1789, 775.

35. Patrick Henry, speech in the Virginia state ratifying convention, June 16, 1788, in *The Complete Anti-Federalist*, Storing, ed., vol. 5, 246–47.

36. Herbert J. Storing, "The Constitution and the Bill of Rights," in *Taking the Constitution Seriously: Essays on the Constitution and Constitutional Law*, ed. Gary L. McDowell (Dubuque, Ia.: Kendall-Hunt Publishing Co., 1981), 277.

37. George H. Reese, ed., *Proceedings of the Virginia State Convention of 1861* (Richmond: Virginia State Library, 1965), vol. 3, 24–25; vol. 1, 709.

38. The following statement from Mississippi is typical: "There is, however, a great principle underlying all constitutions and government . . . the right of the people to alter, to change, to amend, aye, to abolish the form of government whenever to them it shall seem proper. That, gentlemen of the Convention, is the great principle which underlies not only your federal constitution, but which lies at the basis of your State constitutions—the right of the people, the power of the people, aye, and the duty of the people, to resume the powers of government with which they have entrusted their agents whenever those agents have proven and manifested themselves to be unfaithful in the discharge of the trust." E. Barksdale, *Journal of the Convention and Ordinances and Resolutions Adopted in January*, 1861 (Jackson, Miss.: State Printer, 1861), 166.

Chapter 3: Preserving a Living Constitution

1. "Brutus," 15, March 20, 1788, in Kurland and Lerner, eds., *The Founders' Constitution*, vol. 4, 238–39.

2. *Calder v. Bull*, 387–88.

3. Ibid., 398–99. Concurring opinion.

4. *Fletcher v. Peck*, 139.

5. Ibid., 143. Concurring opinion.

6. *Savings and Loan Association v. Topeka*, 20 Wall. 655 (1875); L.Ed., 455, 461.

7. Ibid., 463. It should be pointed out that this case was decided long before the "takings" clause of the Fifth Amendment (or any other provision of the Bill of Rights) had been incorporated into the Fourteenth Amendment, which means that at the time the Constitution of the United States imposed no restrictions on state "takings." Thus, in effect, the Court held that the *state* constitution did not permit the state to do this; in

line with this, the cases cited in support of the judgment were all state cases. But, of course, the Court had no authority to expound the meaning of state constitutions.

8. James Madison, letter to Spencer Roane, September 2, 1819, in Marvin Meyers, ed., *The Mind of the Founder: Sources of the Political Thought of James Madison*, rev. ed. (Hanover, Mass.: Brandeis University Press, 1981).

9. James Madison, letter to Henry Lee, June 25, 1824, in *The Writings of James Madison*, ed. Gaillard Hunt (New York: G. P. Putnam's Sons, 1900–1910), vol. 9, 191. The passage cited in the text begins as follows: "I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution."

10. *Marbury v. Madison*, 1 Cranch 137 (1803).

11. Thomas Jefferson, letter to Wilson Cary Nicholas, September 7, 1803, in *Thomas Jefferson, Writings*, 1140.

12. *Federalist* 78.

13. William Cranch and Joseph Story, in Kurland and Lerner, eds., *The Founders' Constitution*, vol. 4, 188.

14. Ibid., 206.

15. Ibid., 205.

16. Robert P. Kraynak, "Tocqueville's Constitutionalism," *American Political Science Review* 81, no. 4 (December 1987): 1191.

17. William J. Brennan Jr., "The Constitution of the United States: Contemporary Ratification," *South Texas Law Review* 27 (1986): 433–34.

18. *Lochner v. New York*, 198 U.S. 45 (1905).

19. See, for example, *Griswold v. Connecticut*.

20. *Buck v. Bell*, 274 U.S. 200 (1927). See Walter Berns, "*Buck v. Bell*: Due Process of Law?" *Western Political Quarterly* 6 (December 1953): 762–65.

21. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

22. *Eugenical News* 19 (November–December 1934): 140–41.

23. *Lochner v. New York*, 75. Dissenting opinion.

24. *McCulloch v. Maryland*, 4 Wheat. 316, 407, 415 (1819).

25. See Walter Berns, *Taking the Constitution Seriously* (New York: Simon and Schuster, 1987), 207–8. The statement has been misquoted many times, beginning in Chief Justice Charles Evans Hughes's opinion for the Court in *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 443 (1934).

26. *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 669 (1966).

27. Ibid., 676. Dissenting opinion.

28. "The idea of natural law rests on the following presuppositions. 1. A last and profound unity of mankind, a unity of conscience in the last and least of human beings. However darkened or enlightened by primitive civilizations and progressive cultures, by deleterious habits become traditions and by lack of serious efforts to live up to the demand of critical consciousness, there exists a unity and community of human conscience, of human nature through all the epochs, in all races, in all nations. 2. The ability

of the human intellect to perceive the essential and the unchangeable nature of things, in other words, the actual objective reality. The measure of our knowledge is the thing in its essence; it is not the categorical forms of the subjective mind, induced by the phenomena of the things that produce order out of the chaos of the phenomena. 3. Granted that the human mind recognizes the nature of things, this nature is for the existing thing at the same time its end and perfection. It is the degree of realized idea in an existing thing that determines the degree of its goodness. 4. Superiority of the intellect. The intellect recognizes the nature of things and presents to the will the concrete thing as a good that ought to be striven after." Rommen, *The State in Catholic Thought*, 169–70.

29. Carl L. Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (New York: Vintage Books, 1942), 277.

30. "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." Pound, "Introduction," in *The Forgotten Ninth Amendment*, ii, iv.

31. Ibid.

32. See Berns, *Taking the Constitution Seriously*, 23.

33. Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953), 1–2.

34. Sanford Levinson, *Constitutional Faith* (Princeton, N.J.: Princeton University Press, 1989), 172.

35. Ibid., 64–65.

36. Thomas L. Pangle, "Post-Modernist Thought," *Wall Street Journal*, January 5, 1989.

37. Levinson, *Constitutional Faith*, 191.

38. Michael J. Perry, *Morality, Politics, and Law: A Bicentennial Essay* (New York: Oxford University Press, 1988), 148–50.

39. Ibid., 162.

40. Three of these clauses are to be found in the Fifth Amendment (grand jury indictment, double jeopardy, and due process), one in the Fourteenth Amendment (due process), and one in article 1, section 2 (where the president is given the power to grant reprieves).

41. *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 647 (1987). Concurring opinion.

42. Fred Baumann, "Historicism and the Constitution," in *Confronting the Constitution*, ed. Allan Bloom (Washington, D.C.: AEI Press, 1990), 286.

43. Joseph L. Rauh Jr., "The Supreme Court: A Body Politic," *Washington Post*, March 5, 1980.

Chapter 4: The Demise of the Constitution

1. John Quincy Adams, "Inaugural Address," delivered March 4, 1825, in *Inaugural Addresses of the President of the United States from George Washington 1789 to Harry S. Truman 1949* (Washington, D.C.: Library of Congress, 1952), 43.

2. The Episcopal Church, *Book of Common Prayer* (Oxford: Oxford University Press, 2000).

3. *Marbury v. Madison*, 5 U.S. 137 (1803).

4. Perry, *Morality*, *Politics, and Law*,148–50.

5. Levinson, *Constitutional Faith*, 191.

6. Robert Bork, "Tradition and Morality in Constitutional Law" (Francis Boyer Lecture, Washington, D.C., December 6, 1984).

7. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), 149.

8. Ibid., 181.

9. Ibid., 152.

10. Bruce A. Ackerman, *Social Justice in a Liberal State* (New Haven, Conn.: Yale University Press, 1981), 158.

11. Levinson, *Constitutional Faith*, 52.

12. Ibid., 64–65.

13. *Federalist* 78.

Chapter 5: Solving the Problem of Democracy

1. Tocqueville, *Democracy in America*, vol. 2, bk. 4, ch. 7, 326.

2. *Federalist* 1.

3. *Federalist* 2.

4. Ibid.

5. *Federalist* 37.

6. Abraham Lincoln, "Address to the Young Men's Lyceum of Springfield, Illinois," January 27, 1838, in *Lincoln: Speeches and Writings, 1832-1858* (New York: The Library of America, 1989), 35.

7. "Le grand advantage des Américains est d'être arrivés à la démocratie sans avoir à souffrir de révolutions démocratiques, et d'être nés égaux au lieu de le devenir." Alexis de Tocqueville, *De la Démocratie en Amérique* (Paris: Garnier-Flammarion, 1981), vol. 2, 130.

8. "Pourquoi en Amérique, pays de démocratie par excellence, personne en fait-il entendre contre la propriété en général ces plaintes qui souvent retentissent en Europe? Est-il besoin de le dire? C'est qu'en Amérique il n'y a point de prolétaires." Tocqueville, *De la Démocratie en Amérique*, vol. 1, 333–34.

9. See Robert A. Goldwin, *Why Blacks, Women, and Jews Are Not Mentioned in the Constitution, and Other Unorthodox Views* (Washington, D.C.: AEI Press, 1990).

10. Interestingly enough, while the slaves were freed by the Thirteenth Amendment to the Constitution and made citizens of the United States by the Fourteenth, it was not until 1924 that Congress enacted a statute declaring all Indians "born within the territorial limits of the United States . . . to be citizens of the United States." (43 Statutes at Large 253.)

11. Berns, *Taking the Constitution Seriously*, 93–94.

12. Thomas Jefferson to John Adams, 30 August 1787, in *Thomas Jefferson, Writings*, 909.

13. There is no question that the liberties of Japanese-Americans were jeopardized during World War II. On the question of civil liberties during the Civil War, see Mark Neely, *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: Oxford University Press, 1991).

14. Harvey C. Mansfield Jr., *America's Constitutional Soul* (Baltimore: The Johns Hopkins University Press, 1991), 211. Some years after the Constitutional Convention, James McHenry, a delegate to the Constitutional Convention from Delaware, recorded the following entry in his Anecdotes: "A lady asked Dr. Franklin Well Doctor what have we got a republic or a monarchy—a republic replied the Doctor if you can keep it."

15. *Federalist* 9.

16. Ibid.

17. Hobbes, *Leviathan*, ch. 13; Locke, *Two Treatises*, II, sec. 101, 123.

18. Locke, *Two Treatises*, II, sec. 21.

19. Ibid., sec. 93.

20. Ibid., sec. 134.

21. Ibid., sec. 143.

22. Ibid., secs. 143–44.

23. Charles C. Thach Jr., *The Creation of the Presidency, 1775–1798: A Study of Constitutional History* (Baltimore: The Johns Hopkins University Press, 1969), 28–29.

24. Locke, *Two Treatises*, II, sec. 160.

25. "There is," Locke wrote,

> another power in every commonwealth which one may call natural, because it is that which answers to the power every man naturally had before he entered into society; for though in a commonwealth the members of it are distinct persons still in reference to one another, and as such are governed by the laws of the society, yet, in reference to the rest of mankind, they make one body which is, as every member of it before was, still in the state of nature with the rest of mankind. Hence it is that the controversies that happen between any man of the society with those that are out of it are managed by the public, and an injury done to a member of their body engages the whole in the reparation of it. So that, under this consideration, the whole community is one body in the state of nature in respect of all other states or persons out of its community.
>
> This, therefore, contains the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth, and may be called "federative," if anyone pleases. So the thing is understood, I am indifferent as to the name (Locke, *Two Treatises*, II, sec. 145, 146).

26. Abraham Lincoln, for example, suspended the privilege of habeas corpus, a power that, from its place in the Constitution, would seem to belong to the Congress; and, acting in his capacity as commander in chief, he freed the slaves, which, he had argued when first taking the presidential oath of office, the Congress had no authority to do. To mention one more example, Franklin D. Roosevelt, without any authority from Congress, traded fifty of the navy's warships to the British in exchange for ninety-nine-year leases on some naval bases.

27. As one might expect, this is a recipe for conflict between the legislative and executive branches. Depending on the circumstances, each exercises the supreme power, and there is no rule—and in the nature of the case, there cannot be a rule—for determining those circumstances. Whether the executive has exceeded his authority is sometimes (but not always) determined by the Supreme Court, usually the final arbiter of constitutional questions; but if the executive defies the Court (as Abraham Lincoln did), the question of whether he exceeded his authority is determined, in principle, by the people, and, in practice, by a court of impeachment which, under the Constitution, is the Senate of the United States, with the chief justice of the United States presiding.

28. The importance of this principle was demonstrated when it was violated by President Ronald Reagan in the so-called Iran-Contra affair. He pleaded ignorance of the extraordinary actions undertaken by his subordinates, chiefly Colonel Oliver North and Admiral John Poindexter, setting off a lengthy controversy.

29. Walter Berns, "The Constitution as Bill of Rights," in *How Does the Constitution Secure Rights?* ed. Robert A. Goldwin and William A. Schambra (Washington, D.C.: AEI Press, 1985), 50–73.

30. *Dred Scott v. Sandford*, 19 How. (60 U.S.) 393 (1857); *Hepburn v. Griswold*, 8 Wall. (75 U.S.) 603 (1870); *Knox v. Lee*, 12 Wall. (79 U.S.) 457 (1871); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937).

31. *United States v. Eichman*, 496 U.S. 310 (1990); *Korematsu v. United States*, 323 U.S. 214 (1944).

32. *Federalist* 63.

33. Storing, ed., *The Complete Anti-Federalist*, vol. 5, 224.

34. *Federalist* 49.

35. Amendment XVII.

36. Amendments XV, XIX, XXVI, and XXIV.

37. The advent of political parties ensured that presidential electors would be chosen by popular vote of the people; this became evident as early as 1800. Nevertheless, because these popular votes are aggregated at the state rather than at the national level, and because each state is given a number of electors equal to "the whole number of Senators and Representatives to which [it] may be entitled in the Congress," and because each state, regardless of the size of its population, is entitled to two senators, it is always possible that the person who wins a majority of the electoral votes will not have won a majority of the popular votes.

38. Michael Parenti, *Democracy for the Few*, 3rd ed. (New York: St. Martin's Press, 1980).

39. *Federalist* 10.

40. Party government would be possible in the United States only by amending the Constitution in fundamental respects. See James W. Ceaser, "Constitutionalism and a Semiparty System in the United States," in *South Africa's Crisis of Constitutional Democracy*, ed. Robert A. Licht and Bertus de Villiers (Washington, D.C.: AEI Press, 1994), 218.

41. Woodrow Wilson, *Congressional Government: A Study in American Politics* (New Haven, Conn.: Meridian Books, 1965), 91.

42. "We have in this country," Wilson complained (ibid., 142) "no real leadership," but real leadership, especially charismatic leadership, was precisely what the Framers sought to prevent (see *Federalist* 10). What is interesting here is the way Americans speak, or refuse to speak, of government. Whereas the British speak of the Major (or Thatcher or Wilson or Churchill or Chamberlain or Disraeli) government, and the Canadians of the Mulroney (or Trudeau or Diefenbaker or Mackenzie King) government, Americans speak of the Bush (or Reagan or Carter or Roosevelt or Lincoln or Jackson or Washington) administration. This, I think, is not by chance; rather, it derives from the Constitution.

43. American Political Science Association, *Toward a More Responsible Two-Party System*, a report of the Committee on Political Parties (New York: Rinehart, 1950); James MacGregor Burns, *The Deadlock of Democracy: Four Party Politics in America* (Englewood Cliffs, N.J.: Prentice-Hall, 1963).

44. Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan, 1936).

45. Robert E. Brown, *Charles Beard and the American Constitution* (Princeton, N.J.: Princeton University Press, 1956); Forrest McDonald, *We the People—The Economic Origins of the Constitution* (Chicago: The University of Chicago Press, 1958).

46. *Federalist* 12.

47. *Federalist* 10.

48. "Chacun ayant un bien particulier à défendre, reconnaît en principe le droit de propriété." Tocqueville, *De la Démocratie en Amérique*, vol. 1, pt. 2, ch. 6, sec. 3, 334 ("De L'Idée Des Droits Aux États-Unis").

49. See Allan Bloom, ed., *Confronting the Constitution*, especially chs. 10, 12, and 15.

50. *Federalist* 39, 63.

Chapter 6: Constitutionalism and Multiculturalism

1. For an account of the attempt to define culture, see Raymond Williams, *Culture and Society* (New York: Columbia University Press, 1958).

2. Allan Bloom, "Commerce and 'Culture'," in *Giants and Dwarfs: Essays 1960–1990* ed. Allan Bloom (New York: Simon & Schuster, 1990), 280.

3. Charles Taylor, *Multiculturalism and "The Politics of Recognition": An Essay by Charles Taylor with Commentary by Amy Guttman*, ed., Steven C. Rockefeller, Michael Walzer, and Susan Wolf (Princeton, N.J.: Princeton University Press, 1992), 3.

4. H. D. Forbes, "Multiculturalism: The General Principles in the Canadian Case." A paper presented at the 1990 Annual Meeting of the American Political Science Association, held in San Francisco, California, August 30–September 2.

5. Ibid., 16.

6. A news item of some years ago illustrates the problem: "Gojko Susak, the Croatian defense minister who three years ago was running a chain of pizza parlors in Ottawa, Canada, says the U.N. complaints about Croatian deception are 'their excuse for not doing what they are supposed to do.' In his Zagreb office, where a bear skin rug that once belonged to former Yugoslavian strongman Josip Broz Tito covers the floor, Mr. Susak [insists] that the Croats have stopped [the Serbian] offensive." *Wall Street Journal*, March 8, 1993, A6.

7. In this connection, it is interesting to note that "pluralism" as a political term is a neologism, one that made its first appearance in the *Oxford English Dictionary* only with the publication of the *Supplement* in 1982. There we are told that "pluralism," meaning "the existence or toleration of diversity of ethnic groups within a society or state, of beliefs or attitudes within a body or institution, etc.," was first used in 1956 by Horace Kallen in his book *Cultural Pluralism and the American Idea* (Philadelphia: University of Pennsylvania Press, 1956). Professor Rogers Smith informs me, correctly, that Kallen used the term "cultural pluralism" in 1924 in his *Culture and Democracy*.

8. *Annals of Congress*, 1st Cong., 2d sess., February 3, 1790, 1150; 3rd Cong., 2d sess., December 22, 1794, 1008.

9. Jefferson, "Notes on the State of Virginia," Query VIII, in *Thomas Jefferson, Writings,* 211.

10. Ibid., 212.

11. Goodwin Watson, quoted in Kallen, *Cultural Pluralism and the American Idea*, 166.

12. *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974).

13. *Davis v. Beason*, 133 U.S. 334, 341–2 (1890).

14. *United States v. Macintosh*, 283 U.S. 605, 625 (1931).

15. Bernard Lewis, "Western Civilization: A View from the East" (Nineteenth Jefferson Lecture in the Humanities, Washington, D.C., May 1990).

16. Tocqueville, *Democracy in America*, vol. 2, bk. 1, ch. 5, 23.

17. Lord Swann, Committee of Inquiry into the Education of Children from Ethnic Minority Groups, "Education for All: Report of the Committee of Inquiry into the Education of Children from Ethnic Minority Groups," presented to British Parliament in March 1985, 71.

18. S. J. D. Green, "Religion and the Limits of Pluralism in Contemporary Britain," *The Antioch Review* 49, no. 4 (Fall 1991): 581. I am indebted to this article for my account of the British situation.

19. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

20. Jefferson, "Notes on the State of Virginia," Query XVII, in *Thomas Jefferson, Writings*, 285.

21. John Locke, "A Letter Concerning Toleration," para. 6–7, 36, pp. 17, 30.

22. Jefferson, "Notes on the State of Virginia," Query XVII, in *Thomas Jefferson, Writings*, 285.

23. See Berns, *Taking the Constitution Seriously*, 162.

24. Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, vol. 2, 118. The point being debated was the article 6 provision forbidding religious tests for officeholders.

25. Gutmann, in Taylor, *Multiculturalism and "The Politics of Recognition,"* 5.

26. See *Holland v. Illinois*, 493 U.S. 474 (1990).

27. Selden Society, *Select Pleas, Starrs, and Other Records from the Rolls of the Exchequer of the Jews*, ed. J. M. Rigg (London: Bernard Quaritch, 1902), xxi, xl–xlii.

28. Kevin Boyle, Tom Hadden, and Paddy Hillyard, *Law and State: The Case of Northern Ireland* (London: Martin Robertson; Amherst, Mass.: University of Massachusetts Press, 1975), 175.

29. Ibid., 95.

30. Gutmann, in Taylor, *Multiculturalism and "The Politics of Recognition,"* 5.

31. Samuel P. Huntington, "The Clash of Civilizations?" *Foreign Affairs* 72, no. 3 (Summer 1993), 30–31.

32. Pierre Elliott Trudeau, *Federalism and the French Canadians* (Toronto: Macmillan, 1968), 178–79, as reprinted in Forbes, "Multiculturalism: The General Principles," 16.

33. Peter H. Russell, "The End of Mega Constitutional Politics in Canada?" *PS* (March 1993): 33. I am indebted to Professor Russell for much of this account.

34. CBC Archives, "Separation Anxiety: The 1995 Quebec Referendum," Canadian Broadcasting Corporation, http://archives.cbc.ca/IDCC-1-73-1891-12484/politics_economy/1995_referendum/ (accessed June 21, 2006).

35. Jefferson to Roger C. Weightman, in *Thomas Jefferson, Writings*, 1516–17.

36. Paul Richard, "Scrawling in the Margins: New York's Whitney Biennial Spits in the Face of Convention," *Washington Post*, March 4, 1993, C1; Deborah Solomon, "A Showcase for Political Correctness," *Wall Street Journal*, March 5, 1993, 7.

37. Leo Strauss, *Liberalism: Ancient and Modern* (New York: Basic Books, 1968), 262.

38. Werner J. Dannhauser, "Ancients, Moderns, and Canadians," *Denver Quarterly* 4, no. 2 (Summer 1969): 97.

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1. Tocqueville, *Democracy in America*, vol. 1, 280.

2. John Milton, "Areopagitica," in *Complete Poems and Major Prose*, ed. Merritt Y. Hughes (New York: Odyssey Press, 1957), 746.

Chapter 7: States' Rights and the Union

1. Forrest McDonald, *States' Rights and the Union: Imperium in Imperio, 1776–1876*, (Lawrence, Kans.: University Press of Kansas, 2002).

2. Ibid., viii.
3. Ibid., vii.
4. James Madison, "Virginia Resolutions Against the Alien and Sedition Acts," in Hunt, ed., *The Writings of James Madison* (New York: The Library of America, 1999), 589.
5. McDonald, *States' Rights and the Union: Imperium in Imperio, 1776–1876*, 196.
6. Ibid., 197.

Chapter 8: Talkers

1. United States House of Representatives, "Articles of Impeachment exhibited by the House of Representatives against Andrew Johnson," 40th Cong., 2d sess. March 4, 1868, 6.
2. Jeffrey K. Tulis, *The Rhetorical Presidency* (Princeton, N.J.: Princeton University Press, 1987), 75.
3. John F. Harris, "Mr. Bush Catches a Washington Break," *Washington Post*, May 6, 2001.
4. Jimmy Carter, *A Government As Good As Its People* (Fayetteville, Ark.: University of Arkansas Press, 1996), x.

Chapter 9: Why a Vice President

1. John Adams to Abigail Adams, December 19, 1793, in *Bartlett's Familiar Quotations*, ed. Justin Kaplan (Boston: Little, Brown and Company, 2002), 351.
2. Max Farrand, ed., *Records of the Federal Convention of 1787* (New Haven, Conn.: Yale University Press, 1937), 176.
3. Ibid., 31.
4. Ibid., 32.
5. Ibid., 109.
6. U.S. Const. art 1, sec. I (superseded by amend. XII).
7. Farrand, *Records of the Federal Convention of 1787*, 537.
8. Ibid.

Chapter 10: Two-and-a-Half Cheers for the Electoral College

1. Farrand, *Records of the Federal Convention of 1787*, vol. 2, 515.
2. *Ray v. Blair*, 343 U.S. 214 (1952).
3. Henry F. Graff, *Grover Cleveland* (New York: Times Books, 2002), 95.
4. *Counting Electoral Votes in Congress*, U.S. Code 3 (2000), sec. 15 .
5. See Walter Berns, ed., *After the People Vote,* 2d ed. (Washington, D.C.: AEI Press, 1992), 4.
6. Herbert J. Storing, *Toward a More Perfect Union: Writings of Herbert J. Storing*, ed. Joseph M. Bessette (Washington, D.C.: AEI Press, 1995), 397.

Chapter 11: Civil Not Natural Rights

1. Wendy Kaminer, *Free for All: Defending Liberty in America Today* (Boston: Beacon Press, 2002).
2. Ibid., xx.
3. Ibid., 221.
4. Ibid., xvi.
5. Ibid., 210.
6. Ibid., xvi.
7. Ibid.
8. *Griswold v. Connecticut*, 484.
9. Kaminer, *Free for All*, 14.
10. Ibid., 54.
11. David M. Rabban, *Free Speech in Its Forgotten Years, 1870–1920* (New York: Cambridge University Press, 1999), 383.
12. Kaminer, *Free for All,* 55.
13. *Gitlow v. New York*, 268 U.S. 629, 673 (1925), dissenting opinion.
14. Hobbes, *Leviathan*, chs. 13, 82.
15. See Hobbes, *Leviathan*, chs. 13 and 14; Locke, *Two Treatises*, II, sec. 4.
16. Hobbes, *Leviathan*, ch. 14; Locke, *Two Treatises*, II, sec. 95.

Chapter 12: Flag-Burning and Other Modes of Expression

1. *Texas v. Johnson*, 491 U.S. 397 (1989).
2. Editorial, *Washington Post*, June 29, 1989, A24.
3. Hilton Kramer, "Is Art Above the Laws of Decency?" *New York Times*, July 2, 1989.
4. Benjamin Forgey, "The Power of Mapplethorpe's Pictures," *Washington Post*, June 25, 1989.
5. Thomas I. Emerson, *The System of Freedom of Expression* (New York: Random House, 1970), 17.
6. The Helms amendment would have barred federal arts money from being used to promote, disseminate, or produce obscene or indecent materials, including, but not limited to, depictions of sadomasochism, homoeroticism, the exploitation of children, or individuals engaged in sex acts, or material which denigrates the objects or beliefs of the adherents of a particular religion or nonreligion.
7. *Cohen v. California*, 403 U.S. 15 (1971).
8. *National Socialist Party v. Skokie*, 432 U.S. 43 (1977).
9. *Gitlow v. New York*, 673, dissenting opinion.
10. *Communist Party USA v. S.A.C.D.*, 367 U.S. 1, 147–48 (1961), dissenting opinion.
11. Schlesinger, commencement address at Brown University, as quoted by Allan Bloom, *Giants and Dwarfs*, 18.

12. Jefferson, "Notes on the State of Virginia," Query XVII, in *Thomas Jefferson, Writings*, 210.
13. Harvey C. Mansfield Jr., "Political Correctness and the Suicide of the Intellect," *The Heritage Lectures* (Washington, D.C.: Heritage Foundation, 1991), 3.
14. Friedrich Nietzsche, *The Philosophy of Nietzsche* (New York: Modern Library Edition, Random House, 1927), 7.
15. Leo Strauss, *Liberalism: Ancient and Modern*, 261.
16. Levinson, *Constitutional Faith*, 64–65.
17. Ibid.
18. Robert Bork, in conversation with the author.
19. USFlag.org, "United States Code," http://www.usflag.org/uscode36.html (accessed May 24, 2006).
20. *Texas v. Johnson*, 491 U.S. 397 (1989).

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1. Gregory D. Black, *Hollywood Censored: Morality Codes, Catholics, and the Movies* (Cambridge: Cambridge University Press, 1994).
2. Ibid., 228.
3. Ibid., 300.
4. Ibid.
5. Ibid., 207.
6. Ibid.
7. Tocqueville, *Democracy in America*, vol. 2, 83.
8. Ibid.
9. Black, *Hollywood Censored*, 89.
10. Allan Bloom, *The Closing of the American Mind*, 57–58.
11. "Motion Picture Production Code" (Motion Picture Association of America, 1956).
12. Jean-Jacques Rousseau, *Politics and the Arts: Letter to M. d'Alembert on the Theatre*, trans. and ed. Allan Bloom (Glencoe, Ill.: The Free Press of Glencoe, Ill., 1960), 124.
13. Tipper Gore, *Raising PG Kids in an X-Rated Society* (Nashville, Tenn.: Abingdon, 1987).
14. Jean-Jacques Rousseau, *On the Social Contract*, ed. Roger Masters, trans. Judith Masters (New York: St. Martin's Press, 1978), bk. 4, ch. 7, 123.

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1. The D.C. Voting Rights Movement, "The 1978 D.C. Voting Rights Constitutional Amendment," http://www.dcvote.org/trellis/acting/1978amendmenthjres554.cfm (accessed May 19, 2006).

2. U.S. House of Representatives, "Proposed Amendments to the D.C. Statehood Bill," 99th Cong., 1st sess., April 15, 1985.

3. *Constitution of the United States*, Article 2, Section 1, Clause 2.

Chatper 15: Teaching Patriotism

1. Tocqueville, *Democracy in America*, vol. 1, ch. 14, 241.

2. See Locke, *Two Treatises*, II, sec. 6.

3. World Values Survey, "World Values Survey, 1989–1993," http://www.worldvaluessurvey.com (accessed May 25, 2006).

4. Abraham Lincoln, *Speeches, Letters, Miscellaneous Writings, Presidential Proclamations* (New York: Library of America, 1989), vol. 1, 32.

5. Rom. 12:5.

6. Tom Wolfe, *The Painted Word* (New York: Bantam, 1999), 71.

7. Lincoln, *Speeches . . . Writings,* vol. 1, 260.

8. Lincoln, *Speeches . . . Writings,* vol. 2, 624.

9. Tocqueville, *Democracy in America*, vol. 2, 101.

10. "Addresses of the Honorable W. D. Kelley, Miss Anna E. Dickinson, and Mr. Frederick Douglass, at a Mass Meeting, Held at National Hall, Philadelphia, July 6, 1863, for the Promotion of Colored Enlistments," first edition printing, Gettysburg College collection.

11. Robert A. Goldwin, *Why Blacks, Women and Jews Are Not Mentioned in the Constitution, and Other Unorthodox Views*, 17.

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2. Immanuel Kant, *The Metaphysical Elements of Justice*, trans. John Ladd (Indianapolis: Library of Liberal Arts, 1965), 100, 102.

3. Bureau of Justice, "Number of persons executed in the United States, 1930-2005," http://www.ojp.usdoj.gov/bjs/glance/tables/exetab.htm (accessed May 19, 2006).

4. William Shakespeare, "Sonnet 73."

5. Associated Press, "Around the World; French Lawmakers Vote To End Death Penalty," *New York Times*, September 19, 1981; Europa, "EU Presidency declaration on abolition of death penalty on Samoa," http://europa-eu-un.org/articles/en/article_3272_en.htm (accessed June 5, 2006).

6. Council of the European Union, "Charter of Fundamental Rights of the European Union," http://ue.eu.int/uedocs/cmsUpload/CharteEN.pdf (accessed May 19, 2006).

7. It is not clear what they intend to put in the place of the death penalty. Imprisonment for life, perhaps; but one could say that this is as cruel as sentencing someone to death. But, as the French might remember (and would probably prefer that we forget), there are ways of punishing offenders without even bringing them to trial. They (and especially foreigners) can be kidnapped. I happened to be living in Paris in October 1965 when a troublesome Moroccan was kidnapped by the police (or counterintelligence agents). They picked him up in broad daylight, on a very busy street corner (Saint-Germain-des-Prés, directly across from the Café de Flore), and whisked him away in a police car, whence he was never seen again. No trial, no appeal, no fuss, no muss, and no Mehdi Ben Barka.

8. Editorial, "Therapy of the masses," *The Economist*, November 6, 2003, http://www.economist.com/displayStory.cfm?story_id=2172112.

9. Albert Camus, *Carnet II* (Paris: Gallimard, 1964), 31.

10. Nietzsche, "Zarathustra's Prologue," in *The Philosophy of Nietzsche*, 7, 11.

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1. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), 1.

2. Paul L. Murphy, ed., *Liberty and Justice: A Historical Record of American Constitutional Development* (New York: Alfred A. Knopf, 1958), 53.

3. Thomas Jefferson, "Letter to the Danbury Baptists," in *Thomas Jefferson, Writings*, 510.

4. *Everson v. Board of Education*, 330 U.S. 1, 31–32 (1947).

5. *Elk Grove Unified District v. Newdow*, 25, concurring opinion.

6. Ibid., 45, concurring opinion.

7. Ibid., 26.

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1. George Washington to Hebrew Congregation of Newport, Rhode Island, August 17, 1790, in *George Washington: A Collection*, ed. W. B. Allen (Indianapolis: Liberty Classics, 1988), 548.

2. Thomas Babington Macaulay, *The History of England, from the Accession of James II* (Leipzig: Bernh, Tachnitz, Jun. 1849), vol. 4, 88.

3. Thomas Jefferson, "A Bill Establishing Religious Freedom," in *Thomas Jefferson, Writings*.

4. Ibid., 346–48.

5. *Federalist* 78.

6. *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

7. Thomas Jefferson, "A Bill for Establishing Religious Freedom," in *Thomas Jefferson, Writings*.

8. Francis Newton Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* (Washington, D.C.: Government Printing Office, 1909), vol. 1, 566.

9. Anson Phelps Stokes, ed., *Church and State in the United States* (New York: Harper, 1950), vol. 1, 287–89.

10. Act of August 7, 1789, *Statutes at Large*, 1:50. The actual form of the action taken by the First Congress was to "adapt" the ordinance to the new "Constitution of the United States."

11. Thorpe, *The Federal and State Constitutions*, vol. 3, 1689.

12. Ibid., 1189–90.

13. Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, vol. 4, 191–200.

14. Ibid.

15. Anson Phelps Stokes and Leo Pfeffer, *Church and State in the United States*, revised ed. (New York: Harper, 1964), 80.

16. Morton Borden, *Jews, Turks, and Infidels* (Chapel Hill, N.C.: University of North Carolina Press, 1984).

17. Elliot, *Debates*, vol. 2, 117–19.

18. Thomas Jefferson to Roger C. Weightman, in *Thomas Jefferson, Writings*, 1517.

19. Jefferson, "Notes on the State of Virginia," Query XVII, in *Thomas Jefferson, Writings*, 210.

20. George Wilson Pierson, *Tocqueville and Beaumont in America* (New York: Oxford University Press, 1938), 106.

21. J. Hector St. John de Crevecoeur, "What Is An American?" in *Letters From an American Farmer* (London: T. Davies, 1782), 318.

22. Locke, *A Letter Concerning Toleration*, para. 36, 30.

23. Paine, *Rights of Man*, 54.

24. St. George Tucker, *Blackstone's Commentaries* (Philadelphia: William Young Birch and Abraham Small, 1803), vol. 1, 130.

25. Edward Gibbon, *The History of the Decline and Fall of the Roman Empire* (New York: A. L. Burt Co, 1845), ch. 2, 250.

26. James Madison, letter to Thomas Jefferson, October 24, 1787, in Hunt, ed., *The Writings of James Madison*, vol. 5, 30–31.

Preface to Part III, Academic Matters

1. Bloom, *The Closing of the American Mind*, 315.

Chapter 19: The Assault on the Universities: Then and Now

1. My account here of the Cornell crisis of 1969 is based on my notes made at the time, as well as on the extensive account written by Allan Sindler. A shorter version (unpublished) of Sindler's account—"How Crisis Came to Cornell"—was delivered at the 1971 annual meeting of the American Political Science Association. For an outsider's view of the events at Cornell, see Donald Alexander Downs, *Cornell '69: Liberalism and the Crisis of the American University* (Ithaca, N.Y.: Cornell University Press, 1999).

2. The scientists' turn came in 1971 when students blew up the Mathematics Research Center at the University of Wisconsin, killing a postdoctoral fellow and destroying the life work of five physics professors. Since then, science as such has come under attack from feminists, Afrocentrists, and a variety of "postmodernist" professors. For a detailed account of this anti-science campaign, see Paul Gross and Norman Levitt, *Higher Superstition: The Academic Left and Its Quarrels With Science* (Baltimore: The Johns Hopkins University Press, 1994).

3. Berrigan was a campus hero, famous for leading the band of grim ecclesiastics who wrested card files from the hands of the clerk of the Catonsville, Maryland, draft board office and burned them in the parking lot with homemade napalm. When, in a public debate in the law school auditorium, I asked him whether they had given some thought to the possibility that some harm might come to the defenseless and probably terrified clerk, he replied, "Yes, we gave that *prayerful* consideration, but we decided the protest was so important that we had to run that risk. . . . Besides," he added after a short pause, perhaps recalling that they had not bothered to solicit the clerk's opinion as to whether she was willing to run that risk, "anyone who works for the draft board deserves no more consideration than the guards at Belsen and Dachau."

4. Wolfe, *The Painted Word,* 71.

5. Bayard Rustin, "The Failure of Black Separatism," *Harper's*, January 1970, 30.

6. Richard Bernstein, *Dictatorship of Virtue: Multiculturalism and the Battle for America's Future* (New York: Alfred A. Knopf, 1994), 71.

7. Ibid.

8. Ibid., 64–65.

9. Ibid., for a detailed account of this haranguing.

10. Informed of the newspaper theft, Hackney said that "two important values, diversity and open expression, appear to be in conflict." That "conflict" was resolved as Perkins would have resolved it. Instead of punishing the students who stole the newspapers, the university punished the campus police who apprehended them. According to the official report of the university's Judicial Inquiry Office, the police should have known that they were dealing with "a form of student protest [and not] criminal behavior."

11. Susan Estrich, *USA Today*, February 23, 1995, 11A.

12. Clifford Orwin, "Compassion," *The American Scholar* (Summer 1980), 323.

13. Christina Hoff Sommers, *Who Stole Feminism?* (New York: Simon & Schuster, 1994), 28.

14. Students in a women's studies course at Georgetown University are required to read the "SCUM Manifesto," the flavor of which is contained in the following statement: "SCUM [Society For the Cutting Up of Men] is too impatient to hope and wait for the brainwashing of millions of [male] assholes. . . . SCUM will not picket, demonstrate, march or strike to attempt to achieve its ends. Such tactics are for nice, genteel ladies who scrupulously take only such action as is guaranteed to be ineffective. . . . SCUM will kill all men who are not in the Men's Auxiliary of SCUM." Valerie Solanas, "S.C.U.M. Manifesto," http://www.womynkind.org/scum.htm (accessed May 25, 2006).

15. "On peut aisément concevoir qu'en s'efforçant d'égaler ainsi un sexe à l'autre, on les dégrade tous les deux; et que de ce mélange grossier des oeuvres de la nature il ne saurait jamais sortir que des hommes faibles et des femmes déshonnêtes." Tocqueville, *De la Démocratie en Amérique*, vol. 2, bk. 3, ch. 12 ("Comment Les Américains Comprennent L'égalité De l'homme et de la Femme," or "How the Americans Understand the Equality of Men and Women").

16. Sheldon S. Wolin and John H. Schaar, *The Berkeley Rebellion and Beyond* (New York: New York Review of Books, 1970), 40.

17. The students took as their models Mao Zedong, Castro, and Che Guevara, but they might just as well have taken someone from Nazi Germany or Fascist Italy. I proved this when, to an American Government class at the height of the Cornell crisis, I read some speeches analyzing the situation and calling for what ought to be done. The radicals in the class were enthusiastic until I revealed that the speeches were by Mussolini.

18. Thomas M. Smith, Beth Aronstamm Young, Susan P. Choy, Marianne Perie, Nabeel Alsalam, Mary R. Rollefson, Yupin Bae, *The Condition of Education*, *1996* (Washington, D.C.: National Center for Education Statistics, 1996), 132.

19. Tocqueville, *Democracy in America*, vol. 2, bk. 4, ch. 6 ("What Sort of Despotism Democratic Nations Have to Fear").

20. Ibid., vol. 2, bk. 2, ch. 10.

21. See Raymond Williams, *Culture and Society* (New York: Columbia University Press, 1958).

22. Bloom, *Giants and Dwarfs*, 293.

23. George Levine et al., "Speaking for the Humanities," ACLS Occasional Paper, No. 7 (1989), 2–3, 14.

24. A. Bartlett Giamatti, "In Memoriam," *Yale French Studies* 69 (1985): 6.

25. J. Hillis Miller, "The Triumph of Theory, the Resistance to Reading, and the Question of the Material Base," *PMLA* 102, no. 3 (1987): 289.

26. Dominick LaCapra, *Representing the Holocaust* (Ithaca, N.Y.: Cornell University Press, 1994), 114.

27. John M. Ellis, *Against Deconstruction* (Princeton, N.J.: Princeton University Press, 1989), 146–47.

28. Geoffrey Hartman, "Blindness and Insight," *The New Republic*, March 7, 1988, 30.

29. Paul de Man, *Blindness & Insight: Essays in the Rhetoric of Contemporary Criticism* (Oxford: Oxford University Press, 1971), ix, 11, 141.

30. Jonathan Culler, *Framing the Sign: Criticism and Its Institutions* (Norman, Okla.: University of Oklahoma Press, 1988), 40. See David Lehman, *Signs of the Times: Deconstruction and the Fall of Paul de Man* (New York: Poseidon Press, 1991), 262–63.

31. Hartman, "Blindness and Insight," 30.

32. Roger Kimball, "Professor Hartman Reconstructs Paul de Man," *The New Criterion* (May 1988), 42–43.

33. Bloom, *Giants and Dwarfs*, 293.

34. "Scholar's 40's Articles Debated," *New York Times*, December 1, 1987.

35. *Le Soir* was Belgium's most widely read paper, with a daily circulation of 255,000. After its Belgian owners had fled to France, its name and facilities were taken over by the German authorities. All its articles were censored by the *Militarverwaltung's Propaganda Abteilung* (the Propaganda Division of the Military Administration). The Flemish-language daily *Het Vlaamsche Land* was sponsored by the Germans, and began publication in January 1941; its circulation was 21,000.

36. "En plus, on voit donc qu'une solution du problème juif qui viserait à la création d'une colonie juive isolée de l'Europe, n'entraînerait pas, pour la vie littéraire de l'Occident, de conséquences déplorables. Celle-ci perdrait, en tout et pour tout, quelques personnalités de médiocre valeur et continuerait, comme par le passé, à se développer selon ses grandes lois évolutives." Paul de Man, "Les juifs dans la littérature actuelle," *Le Soir*, March 4, 1941.

37. "La guerre n'aura fait qu'unir plus étroitement ces deux choses si voisines qu'étaient dès l'origine l'âme hitlérienne et l'âme allemande, jusqu'à en faire une seule et unique puissance. C'est un phénomène important, car il signifie qu'on ne peut juger le fait hitlérien sans juger en même temps le fait allemand et que l'avenir de l'Europe ne peut être prévu que dans le cadre des possibilités et des besoins du génie allemand. Il ne s'agit pas seulement d'une série de réformes, mais de l'émancipation définitive d'un peuple qui se trouve, à sa tour, appelé à exercer une hégémonie en Europe." Paul de Man, "Voir la figure de J. Chardonne," *Le Soir*, October 28, 1941.

38. Quoted in Werner Hamacher, Neil Hertz, and Thomas Keenan, eds., *Responses: On Paul de Man's Wartime Journalism* (Lincoln, Neb.: University of Nebraska Press, 1989), 209, 7, 147, 139; Geoffrey Hartman, "Blindness and Insight," *New Republic*, March 7, 1988, 30–31; Leon Roudiez, "Searching for Achilles' Heel: Paul de Man's Disturbing Youth," *World Literature Today* (Summer 1989), 438; Fredric Jameson, *Postmodernism, or, The Cultural Logic of Late Capitalism* (Durham, N.C.: Duke University Press, 1991), 257. In 1991, Jameson's book won the Modern Language Association's James Russell Lowell Prize "for an outstanding literary or linguistic study."

39. Hamacher, Hertz, and Keenan, *Responses: On Paul de Man's Wartime Journalism*, 389, 395.

40. Thomas Jefferson, "Minutes of the Board of Ministers, University of Virginia," in *Thomas Jefferson, Writings*, 479.

41. Paul de Man, *Blindness and Insight: Essays in the Rhetoric of Contemporary Criticism*, 11, 141.

42. Abraham Lincoln, letter to James H. Hackett, August 17, 1863, in *Lincoln, Speeches . . . Writings*, 493.

43. Paul A. Cantor, "Shakespeare—'For All Time'?" *The Public Interest* 110 (Winter 1993) 44.

Chapter 20: Trashing Bourgeois America

1. Gorman Beauchamp, "Dissing the Middle Class," *The American Scholar* (Summer 1995), 336.

2. George Orwell, "The Lion and the Unicorn: Socialism and the English Genius," in *My Country Right or Left, 1940–1943*, vol. 2 of *Collected Essays, Journalism & Letters of George Orwell,* ed. Sonia Orwell and Ian Angus (Boston: Nonpareil Books, 2000), 74–75.

3. Hobbes, *Leviathan,* 36.

4. George Orwell, "The Lion and the Unicorn: Socialism and the English Genius," in *My Country Right or Left, 1940–1943*, 74.

5. Thomas Babington Macaulay, *Critical and Historical Essays* (London: J. M. Dent & Sons, 1953), vol. 2, 353.

6. Martha Nussbaum, "Patriotism and Cosmopolitanism," in *For Love of Country*, ed. Joshua Cohen (Boston: Beacon Press, 1996), 6, 8.

7. Abraham Lincoln, "Eulogy on Henry Clay," in Lincoln, *Speeches . . . Writings*, vol. 1, 264.

8. John B. Judis, "New York Diarist: Bad Trip," *The New Republic*, November 13, 2000, 46.

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